TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible]

No. [illegible]

OTTO OLSEN, PLAINTIFF IN ERROR,

vs.

A. D. SMITH, L. HUTH, L. REST, ET AL.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

FILED MAY 10, 1906.

(18,540.)

(18,940.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 289.

OTTO OLSEN, PLAINTIFF IN ERROR,

vs.

A. D. SMITH, L. HUTH, L. BEST, ET AL.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 2, 1904.

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1 & 2 OTTO OLSEN, Plaintiff in Error,
vs.
A. D. SMITH ET AL., Defendants in Error. } From Galveston County.

Applied for by Messrs. Gresham & Gresham, attorneys for Otto Olsen, plaintiff in error, on the 27th day of December, 1901, delivered to Messrs. Gresham & Gresham, attorneys, this 28th day of December, A. D. 1901.

THOS. D. BRICK,
Clerk of the District Court, Galveston County,
By J. C. GENGLER,
Deputy Clerk.

3 THE STATE OF TEXAS,
County of Galveston.

At a term of the district court, 56th judicial district, begun and holden at Galveston, within and for the county of Galveston, before the Hon. Robert M. Franklin, and ending on the twenty-sixth (26″) day of November, A. D. 1901, the following case came on for trial, to-wit:

A. D. SMITH ET AL., Plaintiffs,
vs.
OTTO OLSEN, Defendant. } No. 22627.

4 *Original Petition.*

Filed December 4, A. D. 1900.

THE STATE OF TEXAS,
County of Galveston.

District Court, 56th Judicial District.

To the honorable judge of said court:

The petition of A. D. Smith, L. Huth, L. Best, George Wilson, H. Wachsen, H. G. Jones, William Hayman, Peter Stewart, J. B. Woolford, H. Jobst, R. T. Carroll and F. Johnson, plaintiff-, residing in Galveston county, Texas, against Otto Olsen, also a resident of said county, represents:

1. That plaintiffs are the duly appointed, qualified, commissioned and acting pilots of and at the port of Galveston, Galveston county, Texas, and they, and no others, are authorized to perform the duties of their offices, and to pilot in and out of the port of Galveston, sail vessels and registered steamers, that is, those bound to or from foreign ports.

2. That defendant is neither a branch nor a deputy pilot of the State of Texas, or port at Galveston, and has never been, and he possesses no authority or right, or color thereof, under the laws of Texas, or of the United States, either to act or offer his services as a pilot to any vessel of the kind or class mentioned, but notwithstanding such entire want of right or power, real or colorable, defendant assumes to serve and is actually serving as a pretended pilot and has offered, and still offers his services in that capacity to incoming and outgoing vessels, and is occasionally taken on board and employed by them as a pilot, contrary to law, both State and Federal, and defendant states his purpose to continue holding himself out as a pilot and to guide the movements of arriving and departing vessels to and from the port of Galveston, and plaintiffs believe and aver that his threats of such intended violations of the laws will be carried into effect unless restrained by due process of law.

That defendant, by his unlawful acts and conduct, extending over a long period, and his avowed determination of persisting therein, has caused, and is causing plaintiffs substantial and irreparable injury to their damage in the sum of not less than $1500.00; that is to say, his interference with them by boarding vessels in and out of the port of Galveston, and falsely representing himself to be an authorized pilot, and thus gaining permission from the masters of said vessels to bring them in and out of port, and then piloting such vessels as defendant has done, and is still doing, and threatens to continue to such extent prevents plaintiffs from exercising their official rights and duties as pilots, and from earning and receiving the fees and compensation attached to such services by law, and to which they are entitled under the statutes, *and which they are entitled under the statutes*, and which compensation has been fixed according to law by the board of pilot commissioners of the port of Galveston, and is as follows: For each foot of water which the vessel at the time of piloting draws, to-wit:

A vessel of the capacity of 500 tons or less, $3.00 per foot; a vessel of the capacity of from 500 to 1000 tons, $3.50 per foot; a vessel of the capacity of from 1000 to 1500 tons, $3.75 per foot, and vessels of 1500 tons capacity and over, $4.00, for each foot of water which they draw when piloted.

That defendant is wholly insolvent, and unable to satisfy any judgment for damages that may be recovered against him because of his wrongful and illegal acts, and in fact plaintiffs possess no adequate remedy other than the restraint of an injunction which will compel defendant to desist from acting or attempting to act as a branch or deputy pilot of this port, as he is now doing. That the action and threats on the part of defendant, herein mentioned, are without lawful sanction or color, or semblance thereof, of any character, and is not only an intrusion upon the rights of plaintiffs, but to the extent named, prevents them from discharging their duty as public officers, and is a practical denial by defendant of the right of this State to enact and enforce a system of pilotage laws, or to designate

and appoint efficient and responsible pilots, and to properly regulate the pilotage service, and thus guard the public interests and contribute to the safety and success of navigation and commerce; all of which facts entitle these plaintiffs to the writ of injunction requiring the restraint of the acts existing and threatened which are prejudicial to them, as has been stated, and they, therefore, pray your honor to issue your writ of injunction restraining the said defendant, and commanding him to desist from piloting or attempting to pilot sail vessels or registered steamers bound to or from foreign ports in or out of the port of Galveston, and from acting or assuming to act in any manner as branch or deputy pilot, or pilot, under the laws of the State of Texas, and of said port, or under the laws of the United States, with respect to the kind of vessels specified and upon the final hearing of this cause, plaintiffs pray that the injunc-
6 tion be made perpetual and that judgment be rendered in their favor against the said defendant for their damages, for costs and general relief.

JAMES B. & CHAS. J. STUBBS,
Counsel for Plaintiffs, A. D. Smith et al.

A. D. Smith, being duly sworn, on oath says that he is one of the plaintiffs in this cause, and in the foregoing petition, and that he makes this affidavit on behalf of his co-plaintiffs, being thereunto duly authorized by them, and for himself, and he says that the averments of fact set forth in the foregoing petition are true in substance and in fact.

A. D. SMITH.

Sworn to and subscribed before me this 30th day of November, A. D., 1900.

CHARLES J. STUBBS,
[SEAL.] *Notary Public in and for Galveston County, Texas.*

Upon consideration of the foregoing petition, it is ordered that upon the plaintiffs entering into bond, conditioned obligatory and secured as required by law (said bond to be approved by the clerk of this court), in the sum of three thousand dollars, the said clerk will issue the writ of injunction as prayed for in said petition, except that no injunction will issue restraining the defendant from acting as a pilot under the laws of the United States.

Witness my signature at Galveston, this 4th day of December, 1900.

E. D. CAVIN,
Judge 56th Judicial District.

Filed December 4th, 1900.

ALEX EASTON,
Clerk D. C. G. Co.,
By J. C. GENGLER, *Deputy Clerk.*

First Amended Original Answer.

Filed Nov. 11, 1901.

A. D. SMITH ET AL. vs. OTTO OLSEN. } No. 22627. Suit Pending in the District Court of the 56th Judicial District.

7 Now comes the defendant, Otto Olsen, in the above entitled and numbered cause and by leave of the court first had and obtained, files this his first amended original answer in lieu of his original answer filed February 4th, 1901; and demurs to plaintiffs' petition and says, the matters and things therein contained in manner and form as stated, are not sufficient in law to entitle the said plaintiffs to have or maintain their aforesaid action against him, the said Otto Olsen; and for special and additional causes of demurrer, showeth:

1. That no facts are alleged in said petition which entitle the petitioners to maintain a joint action against this defendant.

2. That petitioners show no facts that entitled them to the equitable relief they seek.

3. That the act of the legislature imposing a penalty of one-half pilotage and a forfeit of fifty dollars is illegal and void, in that it conflicts with the Constitution and laws of the United States.

4. That the acts of the legislature of the State of Texas, under and by which petitioners claim the rights stated in their petition, are in contravention of the rights guaranteed defendant by section 1, of the 14th amendment of the Constitution of the United States and by section 19, of article 1, of the constitution of the State of Texas.

5. That the acts of the legislature of the State of Texas, relied upon by petitioners as authorizing a combination by which they can prevent competition between themselves as also between themselves and others, and by which they monopolize the pilotage at the port of Galveston, are in contravention of the constitution and laws of this State, and of paragraph 3, section 8, article 1, of the Constitution of the United States and the anti-trust act of the Congress of the United States.

Wherefore, and for divers other good causes of demurrer, appearing on the face of said petition, this defendant doth demur thereto, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

GRESHAM & GRESHAM,
Attorneys for Defendant.

Not waiving his demurrers, but relying upon the same, this defendant, for answer, says, that he is a citizen of the United States

and of the State of Texas, and has resided continuously for more than ten years at the port of Galveston in said State, which is a greater term of residence in said State than that required by the board of commissioners of pilots for the said port of Gal-
8 veston; that he is an experienced and skilled seaman and holds a license under the laws of the United States as a pilot of coastwise vessels for the port of Galveston, and is familiar with the harbor of Galveston and entrance thereto, and has served for more than five years as a pilot at that port, and is by education, training and experience, mentally, physically, morally and in all other respects qualified to act as a branch pilot for said port, although he has never been appointed or served as deputy pilot, but he has repeatedly, within the last three years, requested the board of commissioners of pilots for the port of Galveston, to examine him as to his qualifications to act as a branch pilot for said port and to decide on his qualifications and to report their findings to the governor of this State; but said board of commissioners of pilots refused and still refuse to comply with his request, claiming that under the laws of the State of Texas, they have no authority or right to examine any one for the position of branch pilot, unless the applicant has been appointed by and has served as a deputy pilot under one of the petitioners for a term of one year. This defendant is now ready and here offers to prove his competency and skill as a pilot for said port in any manner that this honorable court may deem meet and proper.

This defendant admits that each of the petitioners is a branch pilot and as such is authorized to offer his services as a pilot to any vessel entering or leaving the port of Galveston, but he alleges and so charges that petitioners and each of them have refused to appoint this defendant or any one else as a deputy who will not act under and in accordance with the rules, orders and regulations made by said association, for the purpose of preventing competition.

That petitioners, contriving and intending to counteract the effect of free competition in pilotage at the port of Galveston and to lessen their labors and minimize the facilities they should offer all vessels entering and departing from said port, and to maintain arbitrarily the maximum rates of pilotage allowed by law, have associated themselves together as partners; that by reason of such association and agreement they prevent competition and monopolize the pilotage at said port of vessels engaged in the transportation of traffic and commerce among the several States and with foreign nations; that the combination and agreements of petitioners are in restraint of trade and commerce between the several States and with foreign nations and illegal; that the trade traffic and commerce passing through
9 the port of Galveston are restrained hindered and injured by said combination and the acts of petitioners and the fees charged by them.

That the Federal Government by the construction of jetties has deepened and widened the channel across the bar heretofore exist-

ing at the entrance to the harbor of Galveston and has designated and marked the channel in said harbor by buoys and lights so that the same can be navigated by vessels drawing 22 feet at night as well as by day, and has also established the harbor lines of said port at a point one mile beyond the sea end of said jetties.

That petitioners have been and are now confederating and conspiring to prevent defendant from pursuing his trade or vocation as a pilot at the port of Galveston, and are using their means and influence to harass and injure him, and also to prevent any change in the statutes of the State regulating the appointment of branch or deputy pilots.

This defendant alleges that all vessels that he has piloted or tendered his services to pilot into or out of the port of Galveston, are British vessels; but he says that under the laws and treaties of the United States, he has the right to pilot such vessels into and out of the port of Galveston.

This defendant denies that petitioners have any exclusive right to conduct the pilotage at the port of Galveston, or that they can take from him his right to enjoy, upon terms of equality with all others in similar circumstances, the liberty to pursue his calling, profession or trade as a pilot.

All which matters and things, this defendant is ready to aver and prove, as this court shall direct, and prays to be hence dismissed with his costs in this behalf sustained.

GRESHAM & GRESHAM,
Attorneys for Defendant.

Filed November 11th, 1901.
THOS. D. BRICK,
Clerk D. C. G. Co.,
By J. C. GENGLER, *Deputy.*

First Supplemental Petition.

Filed Nov. 11, 1901.

A. D. SMITH ET AL.
vs.
OTTO OLSEN.
No. 22627.

10 Now come plaintiff- in the above cause, and with leave of court, file this their first supplemental petition, and demur to the first amended original answer, filed November 11th, 1901, of the defendant, because the same states no ground of defense to plaintiffs' suit.

And without waiving the general demurrer, but insisting thereon, plaintiffs especially except to the following parts of said answer:

(1.) To the first paragraph, which alleges, in substance, defendant's skill and experience, which would qualify him to act as a branch pilot, and the refusal of the board of pilot commissioners to examine him with respect thereto.

(2.) To that part of the answer which alleges that plaintiffs had refused to appoint defendant, or any one else, as a pilot, who would not act under and in accordance with the rules, orders and regulations made by the pilots association—because the same are not stated. The court should be advised as to what they are in order that it may determine their effect.

(3.) To all those parts of the answer charging illegal combination and monopoly and agreements and that commerce is restrained by any of the acts of plaintiffs.

(4.) To all that part of the answer that there is not a bar over which it is necessary for vessels to be piloted, and which claims that the improvement of the harbor by the Federal Government deprives plaintiffs of the right given them under the laws to act as pilots.

(5.) To that section of the answer that charges a confederation and conspiracy and the use and means of influence to harass and injure defendant, or to prevent any change in the statutes regulating the appointment of branch or deputy pilots.

(6.) To the averment that defendants have no exclusive right to conduct the pilotage at the port of Galveston and all other like averments in said answer.

And plaintiffs show that none of the above matters excepted to, constitute any defense to plaintiffs' suit, even if they had been fully pleaded, and are indefinite, uncertain and lacking in clearness and sufficiency, and are conclusions of the pleader rather than statements of fact.

Wherefore, plaintiffs pray that the same be stricken out, and they pray for judgment.

JAMES B. & CHARLES J. STUBBS,
Attorneys for Defendants.

11 And without waiving any of the foregoing, but insisting thereon, plaintiffs deny all and singular the averments of defendant's first amended original answer.

JAMES B. & CHARLES J. STUBBS,
Attorneys for Plaintiffs.

Filed November 11th, 1901.

THOS. D. BRICK,
Clerk D. C. G. Co.,
By J. C. GENGLER, *Deputy.*

Judgment of the Court and Notice of Appeal.

A. D. SMITH ET AL.
vs.
OTTO OLSEN. } No. 22627.

NOVEMBER 11TH, 1901.

On this day came on to be heard the above entitled and numbered cause, and the defendant was granted leave to file a first amended original answer in lieu of original answer filed the 11th day of November, 1901, and plaintiffs were granted leave to file their first supplemental petition; and thereupon came on to be heard the demurrer and exceptions of the defendant to plaintiffs' original petition, and it being the opinion of the court that the law is for the plaintiffs, it was considered by the court that the same be overruled; and the demurrer and exceptions of the plaintiffs to the defendant's first amended original answer then came on to be heard, and it being the opinion of the court that the law is for the plaintiffs, it is therefore considered that their exceptions to said answer be and are hereby sustained; to both of which rulings defendant excepted; and it appearing to the court that the said plaintiffs, A. D. Smith, L. Huth, L. Best, George Wilson, H. Wachsen, H. G. Jones, William Hayman, Peter Stewart, J. B. Woolford, H. Jobst, R. T. Carroll and F. Johnson, are entitled to the relief prayed for in said petition. It is therefore considered and so ordered, adjudged and decreed by the court that the temporary injunction heretofore granted in said cause be and the same is hereby perpetuated and the defendant Otto Olsen, and his associates, agents and employees are hereby enjoined and restrained from piloting, or attempting to pilot, sail vessels or register-steamers bound to and from foreign ports in or out of the port of Galveston, and from acting, or assuming to act in any manner as a pilot of said port with respect to the kinds or classes of vessels above specified. And it is further ordered, adjudged and decreed that
12 the said plaintiffs do have and recover of and from the defendant all the costs in this behalf incurred, for which they may have their executions, and that the officers of court have judgment against the parties for the costs by them respectively, incurred, for which also let execution issue.

To all of the foregoing rulings and judgment the defendant, Otto Olsen, excepts and in open court gives notice of appeal.

Petition for Writ of Error.

Filed December 27, 1901.

A. D. SMITH ET AL.
vs.
OTTO OLSEN. } No. 22627.

To Thomas Brick, Esq., clerk of the district court of Galveston county, Texas:

Your petitioner, Otto Olsen, a resident citizen of Galveston county, State of Texas, presents this his petition for a writ of error and shows:

That at the October term 1901 of the district court (the 56th judicial district) of Galveston county, in cause No. 22,627, upon the docket of the district court of said 56th judicial district of Texas, wherein A. D. Smith, L. Huth, L. Best, George Wilson, H. Wachsen, G. H. Jones, William Hayman, Peter Stewart, J. B. Woolford, H. Jobst, R. T. Carroll and F. Johnson were plaintiffs, and your petitioner was defendant, all of whom reside in Galveston county, State of Texas, the said plaintiffs recovered on the 11th day of November, 1901, a judgment against your petitioner, Otto Olsen, perpetuating the injunction as prayed for against him and adjudging him to pay all costs of suit.

That petitioner desires to prosecute a writ of error from said judgment and to remove said cause to the court of civil appeals for the first supreme judicial district, at Galveston, in Galveston county, Texas, for revision and correction.

That he herewith tenders his affidavit in lieu of a bond, and asks the issuance of a supersedeas as required by law.

Wherefore he prays that the said plaintiffs, all of whom reside in the county of Galveston, State of Texas, be cited as required by law and that your petitioner have his writ of error and such other processes and rights as he may be entitled to under the law and he will ever pray, etc.

13 GRESHAM & GRESHAM,
Attorneys for Defendant.

Acceptance of Service of Citation in Error.

Citation in error waived and service accepted.
December 27th, 1901.

JAS. B. & CHAS. J. STUBBS,
Attorneys for Defendants in Error.

Filed December 27th, 1901.
THOS. D. BRICK,
Clerk D. C. G. Co.,
By J. C. GENGLER, *Deputy.*
2—289

Affidavit in Lieu of Bond for Costs.

Filed Dec. 27, 1901.

A. D. SMITH ET AL.
vs.
OTTO OLSEN. } No. 22627.

Otto Olsen, defendant in the above styled and numbered cause, pending in the district court of Galveston county, (56th judicial district,) being duly sworn, at a regular term of said court, to-wit: on the 11th day of December, 1901, the plaintiffs in said cause recovered a judgment against him perpetuating the injunction and taxing him with all costs of suit, from which said judgment he desires to prosecute a writ of error to the court of civil appeals in the first supreme judicial district, but that he is unable to pay the costs of the writ of error or any part thereof, or to give security therefor.

OTTO OLSEN.

Sworn and subscribed to before me in open court, this 27th day of December, 1901.

ROB'T M. FRANKLIN,
Judge of the 56th Judicial District of Texas.

Filed December 27th, 1901.

THOS. D. BRICK,
Clerk D. C. G. Co.,
By J. C. GENGLER, *Deputy Clerk.*

14 *Order of Court Allowing Defendant to Prosecute Writ of Error on Pauper's Affidavit.*

A. D. SMITH ET AL.
vs.
OTTO OLSEN. } No. 22627.

DECEMBER 27TH, 1901.

The defendant, Otto Olsen, on this day filed his affidavit and made oath in open court to the effect that he is unable to pay the costs of the writ of error in this cause, and due notice thereof having been given, and the plaintiffs and officers of the court having failed to offer any objections to said affidavit; it is ordered by the court that said defendant, Otto Olsen, be and he is hereby allowed to prosecute his writ of error in this cause, without bond or security therefor.

Assignment of Errors.

Filed December 27, 1901.

OTTO OLSEN, Plaintiff in Error,
vs.
A. D. SMITH ET AL., Defendant- in Error. } # 22627.

Now comes plaintiff in error in the above numbered and entitled cause and assigns the following errors prejudicial to him committed by the trial court on which he will rely for reversal of the judgment of said trial court:

1. The court erred in overruling defendant's general demurrer to petitioners' petition.

2. The bar, at the entrance of Galveston harbor having been removed and the harbor lines extended seaward for a mile beyond — that bar formerly was; the court erred in holding that plaintiffs have the exclusive right to pilot vessels into and out of the harbor and also the right to collect half pilotage from vessels piloted into port by defendant.

3. The court erred in overruling defendant's general demurrer and special exception No. 3, and in holding that the statute that imposes a liability for half pilotage and a forfeit of $50.00, in favor of a branch pilot, who tenders his services to any vessel outside of the bar, that is afterwards piloted by another person over the bar, is valid and binding, except as to the following classes of vessels; all vessels of whatever burden owned, registered and licensed in the State of Texas, when arriving from or departing to any port in the State of Texas; all vessels of 75 tons burden and under, owned and licensed for the coasting trade in any part of the United States when arriving from or departing to any port in the State of Texas; all vessels of 75 tons or under, owned in the State of Texas, and licensed for the coasting trade in the district of Texas, when arriving from or departing to any port in the United States.

4. The court erred in overruling defendant's general demurrer and special exception No. 4, and in holding that the statute of the State of Texas, prescribing the qualifications and regulating the appointment of branch pilots are valid and do not abridge or deprive defendant of any right guaranteed him by section 1 of the 14th amendment of the Constitution of the United States.

5. The court erred in overruling defendant's general demurrer and special exception No. 4, and in holding that the acts of the legislature of the State of Texas, prescribing the qualifications and regulating the appointment of branch pilots are not in contravention of defendant's right as guaranteed by sec. 19, art. 1 of the constitution of the State of Texas.

6. The court erred in overruling defendant's general demurrer and special exception No. 5, and in holding that the acts of the legislature of the State of Texas, relied upon by petitioners, are not violative of paragraph 3, sec. 8, article 1, of the *Constitution* of the United States and the anti-trust act of the Congress of the United States.

7. The court erred in overruling defendant's general demurrer and 5th special exception and in holding that the acts of the legislature of the State of Texas, prescribing the qualifications and regulating the selection of branch pilots are reasonable and not in conflict with the laws of the United States, or of the State of Texas.

8. The court erred in sustaining petitioners' demurrer to plaintiffs' first amended original answer.

9. The court erred in sustaining petitioners' general demurrer and special exception to defendant's amended answer and in holding that the petitioners have the right to combine and to prevent competition in pilotage at the port of Galveston, and to minimize the service they should offer vessels entering and departing
16 from said port and by their acts to restrain, hinder and injure the trade, traffic and commerce passing through said port.

10. The court erred in sustaining petitioners' special exception No. —, and in holding that petitioners have the right to confederate and conspire to prevent defendant from serving as a pilot.

GRESHAM & GRESHAM,
Attorneys for Plaintiff in Error.

Filed December 27th, 1901.

THOS. D. BRICK,
Clerk D. C. G. Co.,
By J. C. GENGLER, *Deputy Clerk.*

Bill of Costs—Clerk's Fees.

Docketing suit	$ .20
Issuing citation and copies	1.00
Filing papers	2.00
Entering appearance	.15
Entering continuance	.60
Entering orders	1.50
Affidavit with certificate and seal	1.00
Entering final judgment	1.25
Taking bond	1.50
Taxing costs and copy	.25
Writ of injunction and copy	1.50
Transcript	14.00
Filing and certfg. briefs	1.80
	$26.75

Sheriff's Fees.

Serving citation	.75
Serving notice to take deposition	1.00
Jury fee	.50
Serving injunction	.75
	$29.75

Bill of Costs of Appeal.

Filing papers	$ .45
Entering orders	.75
Affidavit with certificate and seal	.50
Transcript	14.00
Filing & cert. to brief	1.80
	$17.50

Sheriff's Fees.

Serving notice	1.00
	$18.50

17 THE STATE OF TEXAS, }
County of Galveston. }

I, Thos. D. Brick, clerk of the district court in and for the county of Galveston, State of Texas, do hereby certify that the foregoing eighteen (18) pages contain a true and correct transcript of all the proceedings had in said court in cause numbered 22,627 and entitled A. D. Smith *et al.*, plaintiffs, *vs.* Otto Olsen, defendant, as all the same appears on file and of record in my office.

Witness, Thos. D. Brick, clerk of the district court of Galveston county.

Given under my hand and official seal, at Galveston, on this the 28th day of December, A. D., 1901.

THOS. D. BRICK,
Clerk of the District Court of Galveston County,
[SEAL.] By J. C. GENGLER,
Deputy Clerk.

Endorsements on transcript: No. —. Otto Olsen, plaintiff in error, *vs.* A. D. Smith *et al.*, defendants in error. Appeal from Galveston county, Texas. Transcript. Applied for by Messrs. Gresham & Gresham, attorneys for Otto Olsen, plaintiff in error, on the 27th day of December, 1901, delivered to said Messrs. Gresham & Gresham, attorneys, this 28th day of December, 1901. Thos. D. Brick, clerk district court Galveston county, Texas, by J. C. Gengler, deputy. Filed in court civil appeals Jan. 6, 1902. 1st district, H. M. Knight, clerk. Filed in the court of civil appeals at San Antonio, Texas, Feb. 4, 1903. H. E. Hildebrand, clerk.

Order of Transfer of Cause.

Be it remembered: That at a term of the honorable court of civil appeals of the State of Texas, begun and holden at Galveston on Oct. 7, 1902, present C. C. Garrett, chief justice, and associate justices, R. A. Pleasants and W. H. Gill, in the cause, Otto Olsen, appellant, *vs.* A. D. Smith *et al.*, appellees. No. 2972. From Galveston county. The following orders were made: Jan. 30, 1902. In compliance with an order of the supreme court of Texas, dated Jan. 27, 1902, it is ordered that this cause be transferred to the court of civil appeals for the fourth supreme judicial district at San Antonio, and that the clerk of this court certify all orders made and costs accrued in this court, and transmit all records and papers in this cause to the clerk of said fourth district."

I, H. M. Knight, clerk of the court of civil appeals of Texas, at the city of Galveston, hereby certify that the foregoing is a true copy of the orders herein made by this court in the above entitled and numbered cause as appears of record.

In witness whereof, I hereunto set my hand and affix the seal of said court at Galveston, this Jan. 30, 1902.

[SEAL.] H. M. KNIGHT, *Clerk.*

Endorsed: #2491. Otto Olsen *vs.* A. D. Smith, *et al.* Copy of orders of court of civil appeals at Galveston. Filed in the court of civil appeals at San Antonio Feb. 4, 1902. H. E. Hildebrand, clerk.

18 *Opinion of Court of Civil Appeals.*

OTTO OLSEN, Plaintiff in Error,
vs.
A. D. SMITH ET AL., Def'ts in Error. } No. 2491. Appeal from Galveston County.

The suit was brought by defendants in error as duly commissioned branch pilots of the port of Galveston against plaintiff in error to enjoin him from piloting, or attempting to pilot sail vessels or registered steamers bound to or from foreign ports in or out of the port of Galveston, and from acting or assuming to act in any manner as branch or deputy pilot or with respect to such vessels. The decree was for injunction accordingly.

The petition alleged in substance that defendant is not a branch pilot nor deputy pilot, but notwithstanding his want of power or right to act, he assumes to act and does act as such; offers his services to incoming and outgoing vessels and is occasionally taken on board and employed by them as a pilot, contrary to law; and de-

clares his purpose to continue holding himself out as a pilot and petitioners believe and aver that his threats of such intended violations of law will be carried into effect, unless he is restrained. That *by* his unlawful acts and conduct and his avowed determination of persisting therein has caused and are causing plaintiffs substantial and irreparable injury, and prevents plaintiffs from exercising their official rights and duties as pilots and from earning and receiving the fees and compensation fixed by law and by the board of pilot commissioners of said port, that defendant is insolvent, and plaintiffs have no other adequate remedy than that of injunction.

The substance of defendant's answer will appear from the several assignments of error, as they are discussed.

Demurrers were made to the petition which were overruled and plaintiffs' demurrers to the answer were sustained and decree was entered granting plaintiffs the relief prayed for, the decree reciting that it appeared to the court that they were entitled to such relief. There is no statement of facts, and we infer that the judgment was rendered on admissions in the answer.

The following is appellant's proposition under the 1st and 2nd assignments. "The bar heretofore existing between the waters of the gulf and the harbor of Galveston having been removed
19 and the Federal Government having extended the harbor lines one mile beyond the sea end of the jetties defendants in error have no right under the law to demand half pilotage." The only relevant allegation in the answer is that the Federal Government by the construction of the jetties has deepened and widened the channel across the bar existing at the entrance to the harbor of Galveston and has designated and marked the channel in said harbor by buoys and lights so that the same can be navigated by vessels drawing 22 feet of water as well as by day, and has also established the harbor lines of said port at a point one mile beyond the sea end of said jetties." The proposition has no connection with the 1st assignment of error which is that the court erred in overruling defendant's general demurrer to plaintiff's petition. Appellant must be asserting said proposition under the 2nd assignment as the court sustained a special demurrer to the portion of the answer above quoted. We think there is nothing in the point. The deepening and widening of the channel across the bar and the extension of the harbor limits, do not affect the applicability of our statutes to the harbor. The legislature evidently intended by the words "outside the bar" outside the harbor limits.

Under the 3rd and 8th assignments the following proposition is advanced:—

"The statute that gives to the pilot, whose services are offered to and refused by a vessel outside of the bar, a claim for half pilotage against the vessel and a claim for a forfeit of $50.00 against the person piloting such vessel into or out of the port and then exempts certain vessels from the provision of the act is in conflict with the laws and treaties of the United States, and void."

In 1866 and in 1871 Congress enacted the following statutes:—

In 1866. "No regulations or provisions shall be adopted by any State which shall make any discrimination in the rate of pilotage or half pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States, and all existing regulations or provisions making any such discrimination are annulled and abrogated." U. S. Rev. Stat., sec. 4237."

In 1871. "No State or municipal government shall impose upon pilots of steam vessels any obligation to procure a State or other license in addition to that issued by the United States, or any other regulation which will impede such pilots in the performance of the duties required by this title; nor shall any pilot charges be levied by any such authority upon any steamer piloted as provided by this title; and in no case shall the fees charged for the pilotage of any steam vessel exceed the customary or legally established rates in the State where the same is performed. Nothing in this title shall be construed to annul or affect any regulation established by the laws of any State, requiring vessels entering or leaving a port in any such State, other than coastwise steam vessels, to take a pilot duly licensed or authorized by the laws of such State, or of a State situate upon the waters of such State." (U. S. Rev. Stat., sec. 4444.)

The former of these provisions conflicts with art. 3801 of our statutes in that the latter exempts "all vessels of whatsoever burthen owned in the State of Texas when arriving from or departing to any port in the State of Texas, and the second also conflicts with our statutes in that they subject certain coastwise steam vessels to pilotage. There can be no question that the acts of Congress on the subject are paramount and nullify at least so much of our statutes as are inconsistent with them. Appellant insists that the several provisions of our pilot law constitute one entire scheme and the intent of the legislature to exempt Texas vessels engaged in strictly State commerce, and to include all coastwise vessels over 75 tons burden, are so interwoven and connected that it is impossible to separate them, or to declare that the legislature would have enacted the law at all if they had in view the illegality of such particular exemption and inclusion. That the objectionable provisions are separable from the rest of the provisions seems to us too plain for discussion.

The individual provisions relate only to coastwise vessels, as distinguished from foreign ones; therefore the subject matters are distinct as between these classes of vessels. It is our opinion that these minor provisions with respect to certain coastwise vessels were not of prime importance in the mind of the legislature, in view of the settled policy of this State since 1846 to establish pilot regulations for its harbors. We therefore cannot accede to the proposition that it is evident or even reasonably inferable that the legislature

would not have enacted the provisions in reference to foreign vessels alone.

21 The Alameda 32 Fed. 333. Reagan *v.* Farmers' Loan & Trust Co., 154 U. S. 362. Tel. Co. *vs.* The State of Texas, 62 Tex. 630.

In this connection it is also claimed that our statutes on this subject conflict with a treaty between the United States and Great Britain of Dec. 22, 1815, a provision of which is as follows:—

"No higher or other duties or charges shall be imposed in any of the ports of the United States on British vessels than those payable in the same ports by vessels of the United States; nor in the ports of any of His Britannic Majesty's territories in Europe on the vessels of the United States than shall be payable in the same ports on British vessels." (Treaties and Conventions between the United States and Other Powers, published by the U. S. Government in 1889, p. 411.)

Defendant alleged that all vessels that he had piloted or tendered his services to pilot in or out of the harbor, are British vessels, and that by virtue of said treaty he has the right to do so. This position taken is that because certain United States vessels (coastwise vessels) are relieved, all British vessels are therefore exempt, whether coastwise or foreign. United States vessels engaged in foreign trade have never been relieved and are still subject to the pilot laws of this State, but says appellant, British ships engaged in foreign trade are nevertheless not subject to them. The meaning of the treaty is evident viz: that British vessels should have the benefits accorded United States vessels at American ports, the same and no more or less, and that no discrimination should be made. In respect to British coastwise vessels they are exempt from our statute because United States coastwise ships have been exempted. The exemption has not been extended to American ships engaged in foreign commerce, and until this is done British vessels of the same character are equally subject to our statute.

Under the 4th and 5th assignments propositions are made, 1st., "that the legislature cannot declare a trade, profession, occupation or business to which none of the functions of government attach, to be an office, limit the number of citizens who may hold the same and prohibit all others, whatever may be their qualifications and fitness from pursuing such trade, profession, occupation or business;" and 2nd, "the provisions of the statute which declare a pilot to be an officer and limit the number of citizens who can serve as
22 pilots to appellees and such deputies as they may choose to appoint *is* void." The assignments are in substance that our statute violates sec. 1 of the 14th amendment of the Federal Constitution and sec. 19 art. 1 of our State constitution, in prescribing the qualifications and regulating the appointment of branch pilots.

Upon this subject much might be written. But in view of the universality of such laws and their long observance and enforcement

in commercial countries, very little *need* be said. The object of such laws is to protect life and property from the perils incident to navigation. Steamship Co. *v.* Joliffe, 2 Wall. 450. The subject comes fairly within the scope of governmental or police functions. We consider the case of Petterson *vs.* Board of Comm'rs. 57 S. W. 1007, as deciding the questions raised by these assignments, against the contention of appellant.

A proposition under the 10th assignment is as follows:—

"It is against public policy and illegal for defendants in error, either as officers of the State or as individuals, to confederate and conspire against the plaintiff in error and to use their means and influence for the purpose of preventing him from becoming a branch pilot and from pursuing his occupation as a pilot."

This proposition is based on an allegation in defendants' answer, and stricken out, which is as follows: "That petitioners have been and are now confederating and conspiring to prevent defendant from pursuing his trade or vocation as a pilot at the port at Galveston and are using their means and influence to harass and injure him and also to prevent any change in the statutes of the State regulating the appointment of branch or deputy pilots."

We fail to perceive how this would constitute a defense to a suit for injunction brought by plaintiffs to enjoin defendant from interfering with the exercise of their official duties, or with the emoluments of their office. It was admitted in the answer that plaintiffs were branch pilots as alleged, and that defendant had not been created a branch or deputy pilot, and that he had been acting and offering to act as pilot to incoming and outgoing British vessels. If so the injunction was properly granted, and the fact that plaintiffs may be using their combined efforts — prevent any change in the laws, or to prevent plaintiff from receiving appointment as a branch or deputy pilot, would not have placed him in any better situation in this proceeding.

23 Under the 6th, 7th and 9th assignments we find the following propositions: "The combination of defendants in error which controls and monopolizes the pilotage at this port of Galveston and prevents competition is illegal in that it is in restraint of commerce among the several States and with foreign nations."

The averment in the answer to which the proposition is applicable is as follows:

"That petitioners, contriving and intending to counteract the effect of free competition in pilotage at the port of Galveston and to lessen their labors and minimize the facilities they should offer all vessels entering and departing from said port, and to maintain arbitrarily the maximum rates of pilotage allowed by law, have associated themselves together as partners; that by reason of such association and agreement they prevent competition and monopolize the pilotage at said port of vessels engaged in the transportation of traffic and commerce along the several States and with foreign nations;

that the combination and agreements of petitioners are in restraint of trade and commerce between the several States and with foreign nations and illegal; that the trade, traffic and commerce passing through the port of Galveston are restrained, hindered and injured by said combination and the acts of petitioners and the fees charged by them."

The State, as already stated, may create the office of pilot. By the same act it has created the office of commissioners of pilots, who decide upon the qualifications of applicants for branch or deputy pilots, and who recommend to the governor where appointments are proper, such as are meritorious, etc. They may for sufficient cause upon hearing suspend a pilot or deputy and the governor has power at will to remove or reinstate one. The entire subject is under the control of the governor and the commissioners. So long as they see fit to retain defendants in error in office as pilots, plaintiff in error cannot question their right to exercise their functions. The very nature of an "office" is that it gives a monopoly of exercising the official acts pertaining thereto to the incumbent, to the exclusion of others, though equally fit. If they improperly conspire and combine, this might be conduct that would suggest their removal by the governor, or be cause for suspension by the commissioners. We cannot see how such acts would, while they are allowed to remain in office, in any manner affect their right to per-
24 form its duties or to protect themselves in its emoluments.

We think, however, that the injunction granted by this decree goes further than petitioners are entitled. The statute contemplates that under certain circumstances an unlicensed pilot may act. This is the effect of art. 3803, "If any person not appointed a branch or deputy pilot shall pilot any ship or vessel out of or into any port when a branch or deputy pilot has offered such service, the person so piloting shall forfeit and pay to such branch or deputy pilot the sum of fifty dollars to be recovered before any court having cognizance of the case."

The decree enjoins plaintiff in error "his associates, agents and employees from piloting or attempting to pilot said vessels or registered steamers bound to or from foreign ports in or out of the port of Galveston."

Under this decree he could not act even in cases where no licensed pilot or deputy offers his services. It may possibly be impracticable at times for service to be tendered by a regular pilot, or this might be the result of unwillingness, or discrimination on their part against vessels. It can be seen that conditions may arise making it possible and proper for an unlicensed pilot to be called into service, and the legislature doubtless had such conditions in view when it enacted the above article. We therefore think that the injunction should be modified in this respect.

The decree goes beyond the pleadings in including within the injunction the associates of plaintiff in error, besides his agents and employees. There is nothing in the petition that asks for relief

against his associates. If they were sought to be included they should have been joined as parties.

The decree will be reformed in these respects and affirmed.

(Signed) J. H. JAMES,
Chief Justice.

Endorsed: No. 2491. In court of civil appeals, fourth supreme judicial district of Texas, San Antonio. Otto Olsen, pl't'ff in error, *vs.* A. D. Smith *et al.*, def'ts in error. From Galveston county. Opinion by J. H. James, chief justice. Filed in the court of civil appeals at San Antonio, Texas, Apr. 23, 1902. H. E. Hildebrand, clerk. Filed in supreme court June 18, 1902. F. T. Connerly, clerk.

25 *Judgment of the Court of Civil Appeals*

WEDNESDAY, *April* 23, *A. D.* 1902.

OTTO OLSEN, Pl't'ff in Error, *vs.* A. D. SMITH ET AL., Def'ts in Error.	No. 2491. Writ of Error from District Court of Galveston County.

This cause came on to be heard on the transcript of the record and the same being inspected, because it is the opinion of the court that there was error in the judgment in so far as the injunction granted by the court below includes the associates of the plaintiff in error, Otto Olsen; it is therefore ordered, adjudged and decreed that the judgment of the court below in so far as it enjoins and restrains the associates of the said plaintiff in error from piloting or attempting to pilot said vessels or registered steamers bound to and from foreign ports in or out of the port at Galveston and from acting or assuming to act as a pilot of said port with respect to the kinds or classes of vessels and steamers above specified be and the same is hereby vacated and set aside; and it being the opinion of this court that the injunction granted by the court below should be limited to cases where a licensed pilot or deputy pilot offers his services to such vessels or registered steamers; it is therefore further ordered, adjudged and decreed that said injunction granted by the court below be and it is hereby limited to such cases where a licensed pilot or deputy pilot offers his services to such vessel or registered steamer and that such injunction shall not apply to a vessel or steamer of the classes named in the judgment of the court below where no licensed pilot or deputy pilot offers his services to such vessel or steamer. And because the court is further of the opinion that there was no other error in the judgment; it is therefore further considered, adjudged and ordered that the judgment of the court below as herein modified and reformed be affirmed; that the defendants in error, A. D. Smith, L. Luth, L. Best, George Wilson, H. Wachsen, H. G. Jones, Wm. Hay-

man, Peter Stewart, J. B. Woolford, H. Jobst, R. T. Carroll, and F. Johnson, pay all costs of this writ of error and this decision be certified below for observance.

26 *Motion for Rehearing.*

In the Court of Civil Appeals, Fourth Supreme Judicial Circuit of Texas.

OTTO OLSEN, Plaintiff in Error,
vs.
A. D. SMITH ET AL., Defendants in Error. } No. 2491.

Writ of error from Galveston county, Texas.

Motion of Plaintiff in Error for Rehearing.

Now comes Otto Olsen, plaintiff in error, in the above cause, and moves this honorable court to set aside its judgment in said cause, rendered on the 23rd day of April, 1902, and to grant him a rehearing therein for the following reasons, to-wit:—

First. The trial court erred in holding that the bar between the waters of the gulf and the harbor of Galveston having been removed and the Federal Government having extended the harbor lines one mile beyond the sea end of the jetties, which is about eight miles from land and beyond the jurisdiction of the State of Texas, defendants in error, have the right to demand half pilotage and to recover a forfeit of $50.00, And that the words "outside the bar" used by the statute means "outside the harbor lines," and this honorable court erred in affirming the trial court's judgment in that particular.

Second. The trial court erred in holding that the statute that gives to the pilot, whose services are offered to and refused by a vessel outside of the bar, a claim for half pilotage against the vessel and a claim for a forfeit of $ 0.00 against the person piloting such vessel into or out or the port and then exempts certain vessels from the provision of the act is not in conflict with the laws and treaties of the United States and void. And this honorable court erred in affirming the trial court's judgment in that particular.

Third. This court erred in holding that the illegal provisions of the pilot laws can be eliminated by the court and the rest of the statute stand as the will of the legislature.

Fifth. The trial court erred in holding that it is not against public policy and illegal for defendants in error to confederate and conspire against the plaintiff in error for the purpose of preventing him from becoming pilot and from pursuing his occupation as a pilot. And this honorable court erred in affirming the trial court's judgment in that particular.

27 Sixth. The trial court erred in holding that the legislature can declare a trade, profession, occupation or business, to which none of the functions of Government attach, to be an office, limit the number of citizens who may hold the same and prohibit all others, whatever may be their qualifications and fitness from pursuing such trade, profession, occupation or business. And this honorable court erred in affirming the trial court's judgment in that particular.

Seventh. The trial court erred in holding, that a branch pilot and a deputy pilot is a State officer. And this honorable court erred in affirming the trial court's judgment in that particular.

Eighth. The trial court erred in holding that the provisions of the statute which designates a pilot "an officer" and limits the number of citizens who can serve as pilots to defendants in error and such deputies as they may appoint is valid.

Ninth. This court erred in holding that the State, under its police powers, can take from a citizen, who possesses the requisite qualifications, his liberty of pursuing his occupation as a pilot.

Respectfully submitted,

GRESHAM & GRESHAM,
Solicitors of Plaintiff in Error.

Endorsed: Mo. #2880. No. 2491. Motion for rehearing. Otto Olsen, plaintiff in error, *vs.* A. D. Smith *et al.*, defendants in error. Filed in the court of civil appeals at San Antonio, Texas, May 2, 1902. H. E. Hildebrand, clerk. Filed in supreme court June 18, 1902. F. T. Connerly, clerk.

Request for Modification of Judgment and Opposition to Motion for Rehearing.

In Court of Civil Appeals, Fourth Supreme Judicial District of Texas.

OTTO OLSEN, Plaintiff in Error, *vs.* A. D. SMITH ET AL., Defendants in Error.	No. 2491. Writ of Error from Galveston County, Texas.

Now comes A. D. Smith and the other defendants in error, and replying to the motion for rehearing, respectfully suggest that as no argument or authority is submitted other than those contained in the brief of plaintiff in error, the motion should be denied,
28 as all of the subjects indicated in the motion were fully considered by the court in its determination of the case.

Defendants in error, however, submit that that part of the opinion reforming the decree of the court below should be withdrawn for several reasons, one of which is that the plaintiff in error, as we under-

stand the assignments presented by him, did not ask this relief. But if he had done so, his pleadings would not authorize such modification of the decree as he claimed the right to pilot British vessels bound to and from foreign ports under any and all circumstances.

While it is possible, although not probable, that the pilots appointed by the governor might not at some time be able or willing to serve a vessel, such a case is not presented by the facts set up in the pleadings in the present case. And as plaintiff in error did not state such a case, nor asked such reformation of the decree, this court might well refrain from thus changing the judgment below.

Again we submit that the clear intendment and effect of the statute is to prohibit others acting as or performing the services of pilots. The payment of the penalty of fifty dollars ($50.00) should not be construed as a license from the State.

There is another view that we would present, and that is that under no circumstances should plaintiff in error be allowed to represent himself as an authorized pilot for vessels bound to or from foreign ports.

The opinion is an epitome of the law and the reason thereof, and we earnestly ask that the court consider this, our suggestion or motion that the decree below be allowed to stand as rendered.

JAMES B. & CHAS. J. STUBBS,
Counsel for Defendants in Error.

Endorsed: 2491. Court of civil appeals, fourth supreme judicial dist. Otto Olsen, pl't'ff in error, *vs.* A. D. Smith *et al*, def'ts in error. Request for modification of judgment of court of civil appeals and opposition to motion for rehearing. Filed in the court of civil appeals at San Antonio, Texas, May 13, 1902. H. E. Hildebrand, clerk.

Order of Court on Motion for Rehearing.

WEDNESDAY, *May 21st, A. D.* 1903.

OTTO OLSEN, Plaintiff in Error,
vs.
A. D. SMITH ET AL., Def'ts in Error.
} No. 2491. Writ of Error from Galveston County.

29

The motion of plaintiff in error for a rehearing, filed May 2, 1902, and the request of defendants in error for modification of judgment, filed May 13, 1902, coming on to be heard and the court having duly considered the same; it is ordered that said motion and said request for modification of judgment be and they are hereby both overruled and it is further ordered that plaintiff in error, Otto Olsen, pay all costs of said motion, and defendants in error, A. D. Smith, L. Huth, L. Best, George Wilson, H. Wachsen, H. G. Jones, Wm.

Hayman, Peter Stewart, J. B. Woolford, H. Jobst, R. T. Carroll, and F. Johnson, pay all costs of said request for modification of judgment.

Copy of Judgment in Supreme Court.

In Supreme Court of Texas, Fourth District.

OTTO OLSEN
vs.
A. D. SMITH ET AL.

JUNE 25, 1902.

This day came on to be heard the application of Otto Olsen for a writ of error to the court of civil appeals for the fourth district, and the same having been duly considered, it is ordered that said application be refused; that the applicant, Otto Olsen, pay all costs incurred on this application.

I, F. T. Connerly, clerk of the supreme court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by said court on said application for a writ of error.

Witness my hand and the seal of said court, this the 1st day of July, A. D. 1902.

F. T. CONNERLY, *Clerk*,
By E. P. GREGG, *Deputy*.

Endorsed: Application No. 3462. Otto Olsen *vs.* A. D. Smith *et al.* Copy of judgment in supreme court. Application for writ of error. Refused. Filed in the court of civil appeals at San Antonio, Texas, July 2, 1902. H. E. Hildebrand, clerk.

Bill of Costs in Supreme Court.

Clerk's office, supreme court.

OTTO OLSEN
vs.
A. D. SMITH ET AL.
No. 3462. Certified Copy Bill of Costs, Supreme Court.

Filing application	$ .50
Docketing petition	.50
Entering appearance of counsel	.50
Filing two briefs	.60
Filing three papers	.90
Entering orders	.50
Entering judgment on application	1.00
Certified copy of judgment	1.00
Taxing costs of application	.50
Certified copy bill of costs	1.00
Total	$7.00

I, F. T. Connerly, clerk of the supreme court of Texas, hereby certify that the above copy of the original bill of costs is true and correct.

30 Witness my hand and the seal of said court, at Austin, this the 1st day of July, 1902.

F. T. CONNERLY, *Clerk.*

Endorsed: Application. No. 3462. Certified copy bill of costs in supreme court, Austin. Otto Olsen *vs.* A. D. Smith *et al.* $7.00. Filed in the court of civil appeals at San Antonio, Texas, July 2, 1902. H. E. Hildebrand, clerk.

Petition for Writ of Error.

In the Court of Civil Appeals, Fourth Supreme Judicial District of Texas.

OTTO OLSEN, Plaintiff in Error, *vs.* A. D. SMITH ET AL., Defendants in Error.	No. 2491. Petition for Writ of Error.

In the above entitled cause, Otto Olsen, plaintiff in error, *vs.* A. D. Smith, L. Huth, L. Best, George Wilson, H. Wachsen, H. G. Jones, William Hayman, Peter Stewart, J. B. Woolford, H. Jobst, R. T. Carroll and F. Johnson, defendants in error, the plaintiff in error, Otto Olsen, feeling himself aggrieved by the judgment of the district court of Galveston county, Texas, entered on the 11th day of November, 1901, and by the judgment of the court of civil appeals of the fourth supreme judicial district of the State of Texas, reforming and affirming said judgment of said district court on the 23rd day of April, 1902, and by the refusal of the supreme court of the State of Texas by its judgment dated June 25th, 1902, to grant to plaintiff in error a writ of error in said cause thereby making the judgment of the said court of civil appeals final, comes by Gresham & Gresham, his attorneys, and petitions said court for an order allowing said plaintiff in error (defendant in the trial court) to prosecute a writ of error to the Supreme Court of the United States of America under and in accordance with the laws of the United States in that behalf made and provided for the reasons specified in the assignment of errors filed herewith, and to the end that the manifest errors apparent in said judgment may be corrected; also that an order be made fixing the amount of bond which said plaintiff in error shall give to pay costs that may be adjudged against him by the Supreme Court of the United States.

31 Plaintiff in error respectfully states that he has this day filed herewith his assignment of errors committed by the

court below in said cause and intended to be urged by him in the prosecution of this his writ of error. And he will ever pray, etc.

GRESHAM & GRESHAM,
Att'ys for Plaintiff in Error.

Ap'l 24th, 1903.—The above petition for writ of error is allowed and the amount of the cost bond fixed at three hundred dollars.

JOHN H. JAMES,
Chief Justice of the Court of Civil Appeals, Fourth Supreme District of Texas.

Endorsed: No. 2491. Otto Olsen plaintiff in error, *vs.* A. D. Smith *et al.*, defendants in error. Petition for writ of error. Filed in the court of civil appeals at San Antonio, Texas, Apr. 24, 1903. H. E. Hildebrand, clerk.

Bond for Writ of Error.

In the Court of Civil Appeals of Texas, Fourth Supreme Judicial District.

OTTO OLSEN, Plaintiff in Error, vs. A. D. SMITH ET AL., Defendants in Error.	No. 2491. Bond for Writ of Error to the Supreme Court of the United States.

Know all men by these presents that we, Otto Olsen, as principal and —— —— and —— —— as sureties, are held and firmly bound unto A. D. Smith, L. Huth, L. Best, George Wilson, H. Wachsen, H. G. Jones, William Hayman, Peter Stewart, J. B. Woolford, H. Jobst, R. T. Carrol and F. Johnson, in the full and just sum of three hundred dollars to be paid to the said A. D. Smith, L. Huth, L. Best, George Wilson, H. Wachsen, H. G. Jones, William Hayman, Peter Stewart, J. B. Woolford, H. Jobst, R. T. Carrol and F. Johnson, their heirs, executors and administrators — which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Witness our hands and seals using scrolls for seals at Galveston, Texas, this 23rd day of April, 1903.

32 Whereas lately at a session of the court of civil appeals for the fourth supreme judicial district of Texas in a suit pending in said court between Otto Olsen, plaintiff in error, and A. D. Smith, L. Huth, L. Best, George Wilson, H. Wachsen, H. G. Jones, William Hayman, Peter Stewart, J. B. Woolford, H. Jobst, R. T. Carrol and F. Johnson, defendants in error, a final judgment was rendered against said plaintiff in error, and the said Otto Olsen, plaintiff in error, having obtained from the Honorable J. H. James,

chief justice of said court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to A. D. Smith, L. Huth, L. Best, George Wilson, H. Wachsen, H. G. Jones, William Hayman, Peter Stewart, J. B. Woolford, H. Jobst, R. T. Carroll and F. Johnson, is about to be issued citing and admonishing them to be and appear at and before the Supreme Court of the United States to be held at Washington, D. C. within thirty days from the date hereof.

Now the conditions of the above obligation is such that if the said Otto Olsen shall prosecute his writ of error to effect, and shall answer all damages and costs that may be awarded against him, if he fails to make his plea good, then the above obligation to be void; otherwise to remain in full force and cirtue.

In witness whereof we hereunto set our hands and seals, using scrolls for seals, this 23rd day of April, 1903.

OTTO OLSEN. [SEAL.]
R. P. WILLIAMSON. [SEAL.]
WM. WILEY. [SEAL.]

UNITED STATES OF AMERICA, }
Southern District of Texas. }

R. P. Williamson and Wm. Wiley, being duly sworn, depose and say and each for himself saith that he is worth three hundred dollars over and above all just debts and liabilities and exemptions.

R. P. WILLIAMSON.
WM. WILEY.

[SEAL.] Sworn to this 22nd day of April, 1903, before me.

R. J. F. S. DREYFUS,
Notary Public in and for Galveston County, Texas.

Approved the within bond and the sureties thereto, Ap'l 24, 1903.

JOHN H. JAMES,
Chief Justice Court of Civil Appeals, 4th Supreme Judicial Dist. of Texas.

Endorsed: Otto Olsen, plaintiff in error, *vs.* A. D. Smith *et al.*, defendants in error. Bond for writ of error. Filed in the court of civil appeals at San Antonio, Texas, Apr. 24, 1903. H. E. Hildebrand, clerk.

33 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the court of civil appeals for the fourth supreme judicial district of the State of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of civil appeals for the fourth supreme judicial district of Texas, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Otto Olsen, plaintiff in error, and A. D. Smith, L. Huth, L. Best, George Wilson, H. Wachsen, H. G. Jones, William Hayman, Peter Stewart, J. B. Woolford, H. Jobst, R. T. Carrol and F. Johnson, defendants in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Otto Olsen, plaintiff in error, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 23rd day of April, in the year of our Lord
34 one thousand nine hundred and three.

C. DART,
Clerk of the Circuit Court of the United States for the Southern District of Texas,
By G. PREDECKI, *Deputy.*

Allowed by
JOHN H. JAMES,
Chief Justice of the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas.

Endorsed: Otto Olsen, plaintiff in error, *vs.* A. D. Smith *et al.* defendants in error. Writ of error. Filed in the court of civil appeals at San Antonio, Texas, Apr. 24, 1903. H. E. Hildebrand, clerk.

Citation.

UNITED STATES OF AMERICA, *ss:*

To A. D. Smith, L. Huth, L. Best, George Wilson, H. Wachsen, H. G. Jones, William Hayman, Peter Stewart, J. B. Woolford, H. Jobst, R. T. Carrol, and F. Johnson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, District of Columbia, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the court of civil appeals for the fourth supreme judicial district of the State of Texas, wherein Otto Olsen is plaintiff in error and you, A. D. Smith, L. Huth, George Wilson, H. Wachsen, H. G. Jones, William Hayman, Peter Stewart, J. B. Woolford, H. Jobst, R. T. Carrol and F. J. Johnson, are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable J. H. James, chief justice of the court of civil appeals for the fourth supreme judicial district of Texas, this 24th day of April, in the year of our Lord one thousand nine hundred and three.

J. H. JAMES,
Chief Justice of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

Endorsed: Otto Olsen, plaintiff in error, *vs.* A. D. Smith *et al.*, defendants in error. Citation. Filed in the court of civil appeals at San Antonio, Texas, Apr. 24, 1903. H. E. Hildebrand, clerk.

35 *Waiver of Citation and Acceptance of Service of Writ of Error.*

In the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

OTTO OLSEN, Plaintiff in Error, *vs.* A. D. SMITH ET AL., Defendants in Error.	No. 2491. Writ of Error to the Supreme Court of the United States.

I, James B. Stubbs, attorney for the defendants in error in the above entitled cause, which is being prosecuted by the plaintiff in error on writ of error to the Supreme Court of the United States, do

hereby waive citation and accept service for the defendants in error, and agree that the cause may be certified to the United States Supreme Court for final action without further notice to the defendants in error or either of them.

JAMES B. STUBBS,
Attorney for A. D. Smith, L. Huth, L. Best, George Wilson, H. Wachsen, H. G. Jones, William Hayman, Peter Stewart, J. B. Woolford, H. Jobst, R. T. Carrol, and F. Johnson, Defendants in Error.

Endorsed: Otto Olsen, plaintiff in error, *vs.* A. D. Smith *et al.*, defendants in error. Waiver of citation and acceptance of service of writ of error. Filed in the court of civil appeals at San Antonio, Texas, Apr. 24, 1903. H. E. Hildebrand, clerk.

Assignment of Errors.

In the Court of Civil Appeals, Fourth Supreme Judicial District of Texas.

OTTO OLSEN, Plaintiff in Error, *vs.* A. D. SMITH ET AL., Defendants in Error.	No. 2491. Assignment of Errors to the Supreme Court of the United States.

In the above entitled and numbered cause, Otto Olsen, plaintiff in error *vs.* A. D. Smith, L. Huth, L. Best, George Wilson, H. Wachsen, H. G. Jones, William Hayman, Peter Stewart, J. B. Woolford, H. Jobst, R. T. Carroll and F. Johnson, defendants in error, the plaintiff in error comes by his attorneys and says that the honorable court of civil appeals for the fourth supreme judicial district of the State of Texas in reforming and affirming the
36 judgment of the district court of Galveston county, Texas, has committed errors prejudicial to him in its opinion, rulings and judgment in this:

1st. The court erred in holding that the statute of the State of Texas (Revised Statute- arts. 3800, 3801 and 3803), that gives to the pilot, whose services are offered to and refused by a vessel outside of the bar, a claim for half pilotage against the vessel and a claim for a forfeit of $50 00 against the person piloting such vessel into or out of the port of Galveston and then exempts certain vessels from the provisions of the act, is valid and not in conflict with the Constitution, laws and treaties of the United States.

2nd. The court erred in holding that the defendants in error have the right to combine and to prevent competition in pilotage at the port of Galveston and that the statutes of the State of Texas that authorize such a combination are not in conflict with the anti-trust law of the United States (26 Stat. 209—c. 647) nor in violation of

paragraph 3 section 8 article 1 of the Constitution of the United States.

3rd. The court erred in holding that the statute of the State of Texas prescribing the qualifications and regulating the appointment of branch pilots is valid and does not abridge the privileges and immunities of plaintiff in error as a citizen of the United States, nor deprive him of his liberty and property without due process of law, nor deny him the equal protection of the law as guaranteed him by the 1st. section of the 14th amendment of the Constitution of the United States.

4th. The court erred in rendering judgment against plaintiff in error upon the pleadings in said cause in that said judgment is contrary to the law and the facts as stated in the pleadings therein.

Wherefore the said plaintiff in error prays that the judgment of said court be reversed and such directions be given that full force and efficacy may inure to plaintiff in error by reason of the defenses set up in his pleadings filed in said cause.

GRESHAM & GRESHAM,
Att'ys for Plaintiff in Error.

Endorsed: No. 2491. Otto Olsen, plaintiff in error, vs. A. D. Smith *et al.*, defendants in error. Assignment of errors. Filed in the court of civil appeals at San Antonio, Texas, Apr. 24, 1903. H. E. Hildebrand, clerk.

37 *Bill of Costs Adjudged Against Smith et al.*

OTTO OLSEN, Pl'ff. in Error, vs. A. D. SMITH ET AL., Def'ts in Error. } No. 2491. From Galveston County.

Filing record	$ .50
Docketing cause	.50
Appearances	1.00
Filing briefs and other papers	2.00
Notices	2.00
Orders	1.00
Judgment	1.00
Recording opinion	5.50
Certificate with seal	.50
Taxing cost	.50
Certified copy bill of costs	1.00
Mandate	1.50
Filing and docketing motion	
Costs in court of civil appeals at Galveston	5.75
Total	$22.75

$22.75 paid by defendants in error. July 23, 1903.

H. E. HILDEBRAND, *Clerk.*

Bill of Costs Adjudged Against Olsen.

OTTO OLSEN, Pl't'ff in Error,
vs.
A. D. SMITH ET AL., Def'ts in Error.
} No. 2491. From Galveston County.

Filing briefs and other papers	$ .40
Notices	1.00
Orders	1.00
Taxing costs	.50
Certified copy bill of costs	1.00
Filing and docketing motion	.35
Precept	1.00
Making certified copy of motion	1.40
Sheriff's fees (paid to sheriff of Galveston county	1.00
Execution for costs and return	1.50
Transcript to supreme court	1.50
Express charges to and from supreme court	.20
Costs in supreme court	7.50
Transcript to Supreme Court of United States	20.00
Total	$37.85

$20.00 for transcript paid by plaintiff in error. May 1st 1903.
H. E. HILDEBRAND, *Clerk.*

38 *Certificate of Clerk.*

STATE OF TEXAS:

Court of Civil Appeals, Fourth Supreme Judicial District.

I, H. E. Hildebrand, clerk of the court of civil appeals of the fourth supreme judicial district of the State of Texas, do hereby certify that the foregoing pages from 1 to 37 inclusive, are a true and correct copy of the original transcript filed in this court in the cause styled Otto Olsen, plaintiff in error, *vs.* A. D. Smith *et al.*, defendants in error, originally brought in the district court of Galveston county, Texas, together with all proceedings had in this court in the said cause.

In testimony whereof I have hereunto signed my name and annexed the official seal of this court, this April 27th, A. D., 1903.

[Seal Court of Civil Appeals of the State of Texas.]

H. E. HILDEBRAND,
Clerk Court of Civil Appeals of the Fourth Supreme Judicial District of Texas.

Endorsed on cover: File No. 18,940. Texas court of civil appeals, 4th sup. judicial district. Term No. 289. Otto Olsen, plaintiff in error, *vs.* A. D. Smith, L. Huth, L. Best, *et al.* Filed May 19", 1903.

Office Supreme Court U.
FILED
SEP 13 1904
JAMES H. McKENNEY,
Clerk

No. 42.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

OTTO OLSEN, PLAINTIFF IN ERROR,

vs.

A. D. SMITH, L. LUTH, L. BEST, ET AL.

IN ERROR TO THE COURT OF CIVIL APPEALS, FOURTH JUDICIAL DISTRICT OF TEXAS.

WALTER GRESHAM,
Attorney for Plaintiff in Error.

Clarke & Courts, Manufacturing Stationers, Galveston.

No. 42.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

OTTO OLSEN, PLAINTIFF IN ERROR,

vs.

A. D. SMITH, L. LUTH, L. BEST, ET AL.

IN ERROR TO THE COURT OF CIVIL APPEALS, FOURTH JUDICIAL DISTRICT OF TEXAS.

STATEMENT.

On the 4th of December, 1900, the defendants in error brought this, their joint action against the plaintiff in error, alleging that they were the duly qualified and commissioned branch pilots for the port of Galveston; and that they, and no others, are authorized to perform the duties of their offices, and to pilot in and out of the port of Galveston, sail vessels and registered steamers;

That plaintiff in error is neither a branch nor a deputy pilot and has no right or authority either to act or offer his services as a pilot to any vessel of the class mentioned; but, notwithstanding such want of right or power, he assumes to serve, and is actually serving, as a pretended pilot to incoming and outgoing vessels and is occasionally taken on board and employed as a pilot, contrary to law;

That plaintiff in error states his purpose to so continue holding himself out as a pilot and to guide the movements of arriving and

departing vessels at the port of Galveston, and defendants in error believe and aver that he will carry out his unlawful intentions unless restrained;

That plaintiff in error, by his unlawful acts and conduct, and his avowed determination of persisting therein, has caused and is causing defendants in error, irreparable injury, to their damage fifteen hundred dollars ($1500);

That by piloting vessels in and out of port, he prevents defendants in error from exercising to some extent their official rights and duties as pilots and from earning and receiving the fees and compensation allowed by law;

That as plaintiff in error is insolvent, defendants in error have no adequate remedy except by injunction;

That the acts of the plaintiff in error are unlawful and an intrusion upon the rights of defendants in error, and, to the extent named, prevent them from discharging their duty as public officers, and that plaintiff in error practically denies the right of this State to enforce its system of pilotage laws;

Wherefore, they pray that plaintiff in error be enjoined from piloting or attempting to pilot sail vessels or registered steamers, bound to or from foreign ports, in and out of the port of Galveston. (Tr., 1-3.)

To this petition plaintiff in error demurred and filed his amended original answer, in which he alleges that he is a citizen of the United States and of the State of Texas, and has resided continuously for more than ten years at the port of Galveston, which is a greater term of residence in the State than that required by law of branch pilots; that he is an experienced and skilled seaman and holds a license under the laws of the United States as a pilot of coastwise steam vessels for the port of Galveston, is familiar with the harbor and the entrance thereto; has served for more than five years as a pilot at that port, and is in all respects qualified to act as a branch pilot, although he has never served as deputy

pilot; that he has repeatedly, within the last three years, requested the Board of Commissioners of Pilots to examine him as to his qualifications to act as branch pilot and to report their findings to the Governor of this State; but they refuse to comply with his request, claiming that, under the laws of this State they have no authority or right to examine any one for the position of branch pilot unless the applicant has been appointed by and has served as deputy pilot under one of the defendants in error for a term of one year.

Plaintiff in error then offered to prove his competency and skill as a pilot in any manner the Court might deem proper.

He admits that each of defendants in error is a branch pilot and entitled to serve as such at the port of Galveston, but alleges that they have associated themselves together as partners under the name of the Galveston Pilot Association; that they pool their earnings and share equally in the profits and losses; that they and each of them refuse to appoint him a deputy, and contend that no one can become a branch pilot unless he has been appointed a deputy by one of them and has served as such for one year, the period of probation fixed by the Board of Commissioners of Pilots; that such refusal and claim has the effect of preventing competition and gives them the exclusive pilot service of the port and the emoluments thereof; that they control the pilotage of the port and have prevented him and all others from acting as deputy or branch pilots in competition with them.

That all vessels that he has piloted, or tendered his services to pilot, into or out of the port of Galveston are British vessels, and that under the laws and treaties of the United States he has the right to pilot such vessels into and out of that port.

He denies that defendants in error have any exclusive right to conduct the pilotage at the port of Galveston, or that they can take from him his right to enjoy, upon terms of equality with all

others in similar circumstances, the liberty to pursue his calling, profession or trade as a pilot.

To this answer defendants in error filed a general demurrer and special exceptions.

On the 11th day of November, 1901, the Court overruled plaintiff-in-error's demurrer and exceptions to defendants-in-error's petition, sustained defendants-in-error's demurrer and exceptions to plaintiff-in-error's answer, and enjoined plaintiff in error from acting as a pilot in accordance with the prayer of the petition. (Tr., 8.)

From this judgment the plaintiff in error on the 27th day of December, 1901, prosecuted a writ of error to the Court of Civil Appeals for the First Supreme Judicial District at Galveston, Texas. (Tr., 9.)

On the 30th day of January, 1902, the cause was transferred to the Court of Civil Appeals for the Fourth Judicial District at San Antonio, Texas. On the 23d of April, 1902, that Court modified, reformed and affirmed the judgment of the lower Court. (Tr., 14-20.) Plaintiff in error on the 2d of May, 1902, filed a motion for a rehearing (Tr., 22), which was on the 21st of May, 1902, overruled. On the 25th day of June, 1902, the application of plaintiff in error to the Supreme Court of the State of Texas for a writ of error was refused. (Tr., 24.)

Thereafter the plaintiff in error filed his petition for a writ of error to the Supreme Court of the United States, together with assignments of error and a supersedeas bond. The petition was allowed, the supersedeas bond approved, the writ of error duly filed in the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, it being the highest court in the State of Texas in which a decision in this case could be had, and citation was waived, and service accepted by the defendants in error on the 24th of April, 1903. (Tr., 25-29.)

The case is now before this Court for review upon the following assignments of error.

ASSIGNMENTS OF ERROR.

1st. The Court erred in holding that the statute of the State of Texas (Rev. Stats., Arts 3800, 3801 and 3802), that gives to the pilot, whose services are offered to and refused by a vessel outside of the bar, a claim for half pilotage against the vessel, and a claim for a forfeit of $50.00 against the person piloting such vessel into or out of the port of Galveston, and then exempts certain vessels from the provisions of the act, is valid and not in conflict with the Constitution, laws and treaties of the United States.

2d. The Court erred in holding that the defendants in error have the right to combine and to prevent competition in pilotage at the port of Galveston, and that the statutes of the State of Texas that authorize such a combination are not in conflict with the anti-trust law of the United States (26 U. S. Stats., 209c, 647), nor in violation of paragraph 3, Section 8, Article I, of the Constitution of the United States.

3d. The Court erred in holding that the statute of the State of Texas prescribing the qualifications and regulating the appointment of branch pilots is valid and does not abridge the privileges or immunities of plaintiff in error as a citizen of the United States, nor deprive him of his liberty and property without due process of law, nor deny him the equal protection of the law as guaranteed him by the first section of the Fourteenth Amendment of the Constitution of the United States.

4th. The Court erred in rendering judgment against plaintiff in error upon the pleadings in said cause, in that said judgment is contrary to the law and the facts as stated in the pleadings therein.

ARGUMENT.

The first assignment raises the question of the validity of the following provisions of the Revised Statutes of Texas (1895):

"ART. 3800. The rate of pilotage on any class of vessels shall not, in any port of this State, exceed four dollars for each foot of water which the vessel at the time of piloting draws, and whenever a vessel, except of the classes below excepted, shall decline the services of a pilot, offered outside the bar, and shall enter the port without the aid of one, she shall be liable to the first pilot, whose services she so declined, for the payment of half pilotage; and any vessel, which after being brought in by a pilot, shall go out without employing one, shall be liable to the payment of half pilotage to the pilot who brought her in, or, if she has come in without the aid of a pilot, though offered outside, she shall, on so going out, be liable for the payment of half pilotage to the pilot who had first offered his services before she came in, but if she has come in without the aid of a pilot, or the offer of one outside, she shall not, in case of going out without a pilot, be liable to half pilotage. At any port where vessels shall receive or discharge their cargoes at an anchorage outside of the bar, such vessel shall be liable to pilotage at the above rate to such anchorage, but shall not be liable for or compelled to pay pilotage from such anchorage to the open sea; and if any vessel bound from the open sea to such anchorage, while under way, shall decline the services of a pilot, and shall afterwards receive or discharge any portion of her cargo at such anchorage, on the lighters or otherwise, she shall be liable for the payment of half pilotage, at the above rate, to such anchorage to the first pilot whose services shall have been tendered to and declined by her, but not liable for any pilotage from such anchorage to the open sea; and when a pilot takes charge of a vessel twenty miles outside of the bar, and brings her to it, he shall be entitled to one-fourth pilotage for such off-shore service,

in addition to what he is entitled to recover for bringing her in, but if such off-shore service be declined, no portion of said compensation shall be recovered."

"ART. 3801. The following classes of vessels shall be free from any charge for pilotage, unless for actual service, to wit: All vessels of twenty tons and under, all vessels of whatsoever burthen owned in the State of Texas and registered and licensed in the district of Texas, when arriving from or departing to any port of the State of Texas; all vessels of seventy-five tons and under, owned and licensed for the coasting trade in any part of the United States, when arriving from or departing to any port in the State of Texas; all vessels of seventy-five tons or under owned in the State of Texas and licensed for the coasting trade in the district of Texas, when arriving from or departing to any port in the United States."

"ART. 3803. If any person not appointed a branch or deputy pilot shall pilot any ship or vessel out of or into any port when a branch or deputy pilot has offered such service, the person so piloting shall forfeit and pay to such branch or deputy pilot the sum of fifty dollars, to be recovered before any Court having cognizance of the case."

When the Constitution of the United States was adopted, the power to regulate commerce with foreign notions, and among the several States, which includes the right to regulate pilots and pilotage, was conferred upon Congress. At that time the channels of the various harbors and rivers in the United States were not known except to the local pilots. There had been no surveys, no charts, no buoys and no improvements made by the Federal Government. Congress recognizing these facts, on the 7th day of August, 1789, passed an act which provides:

"SEC. 4235 (U. S. Rev. Stats.) Until further provision is made by Congress, all pilots in the bays, inlets, rivers, harbors, and ports of the United States, shall continue to be regulated in conformity

with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively enact for the purpose."

For the purpose of preventing any State from discriminating in favor of its citizens and vessels, Congress in 1866 enacted the following law:

"SEC. 4237 (U. S. Rev. Stats.) No regulations or provisions shall be adopted by any State which shall make any discrimination in the rate of pilotage or half-pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States; and all existing regulations or provisions making any such discrimination are annulled and abrogated."

With the view of still further limiting the right of the States to regulate pilotage and to extend Federal control over the same, Congress in 1871 enacted:

"No state or municipal government shall impose upon pilots of steam vessels any obligation to procure a State or other license in addition to that issued by the United States, or any other regulation, which will impede such pilots in the performance of the duties required by this title; nor shall any pilot-charges be levied by any such authority upon any steamer piloted as provided by this title; and in no case shall the fees charged for the pilotage of any steam vessel exceed the customary or legally established rates in the State where the same is performed. Nothing in this title shall be construed to annul or affect any regulation established by the laws of any State, requiring vessels entering or leaving a port in any such State, other than coastwise steam vessels, to take a pilot duly licensed or authorized by the laws of such State, or of a State situate upon the waters of such State." (Sec. 4444, U. S. Rev. Stats.)

Construing the exemptions enumerated in Article 3801 of the Revised Statutes of Texas, with the Acts of Congress above quoted, and also with the Federal Constitution, we find that the State statute is repugnant to the federal law in three particulars:

1st. It exempts from pilotage all vessels of whatsoever burthen, owned in the State of Texas, and registered and licensed in the district of Texas, when arriving from or departing to any port of that State, thus discriminating in favor of Texas ports, and against those of other states, and also conferring upon citizens of Texas exemptions and privileges that are denied the citizens of other states.

2d. It exempts all vessels of seventy-five tons and under, owned and licensed for the coasting trade in any port of the United States, when arriving from or departing to any port in the State of Texas. This is a discrimination against the ports of other states of the Union and in favor of Texas ports. (U. S. Const., Art. I, Sec. 9, clause 5.)

3d. It exempts all vessels of seventy-five tons and under, owned in the State of Texas, and licensed for the coasting trade in the district of Texas, when arriving from or departing to any port in the United States. This is a privilege in favor of vessels owned and licensed in Texas, and a discrimination against vessels owned by citizens of other states. (U. S. Const., Art. IV, Sec. 2, clause 1.)

The Court of Civil Appeals held that while these provisions of the State statute are in conflict with the laws of Congress, yet the objectionable provisions are separable from the rest of the provisions, and may be eliminated, and leave the remainder of the act in force. (Tr., 16.)

When these acts of Congress were passed, a portion of the provisions of the Texas statute now under discussion were embraced in one section. (Oldham & White's Dig., Art. 1585.) The Legislature, in 1879, when it revised and adopted this statute,

instead of amending it to conform to the federal law, enlarged and re-enacted it in two sections. It was again re-enacted as Arts. 3800, 3801, in the Revised Statutes of 1895.

If we eliminate from the statute the exceptions referred to by the Court of Civil Appeals, then, under the provision of Art. 3800, all vessels, except those of twenty tons burthen and under are required by this statute to pay pilotage, even though they be coastwise steam vessels that are exempt by the act of Congress. (U. S. Rev. Stats., Sec. 4444.)

This article of the State statute, in fixing the rate of pilotage and designating the vessels that shall be liable for the same, expressly provides that the provisions of the law shall not apply to vessels of the excepted classes. Then follows Article 3801, in which the illegal exceptions appear. To make these two articles of the statute conform to the ruling of the Court of Civil Appeals, not only must all the provisions of Article 3801, except the first exception, be stricken out, but Article 3800 must also be amended, so as to exempt steam vessels engaged in coastwise trade.

If the whole of Article 3801 be eliminated, then every vessel of whatsoever burthen entering the port, whether a coastwise steam vessel or not, is liable under the remainder of the statute for half pilotage, and the person piloting a vessel into or out of the port, unless he is a branch pilot or a deputy, must forfeit and pay $50.00.

The articles under discussion clearly constitute one entire scheme, and the illegal provisions of the statute are so interwoven and connected that it seems impossible to separate them without substituting the opinion of the Judge for the expressed will of the Legislature. The Supreme Court of the United States in Sprague vs. Thompson, in construing a similar provision in the pilot law of the State of Georgia, where the Supreme Court of that State held that the illegal exceptions might be disregarded, so that the rest of the section might stand, said: "The insuperable difficulty

with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the Legislature of Georgia the statute is made to enact what confessedly the Legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions. We are therefore constrained to hold that the provisions of Section 1512 of the Code of Georgia, can not be separated so as to reject the unconstitutional exceptions merely, and that the whole section must be treated as annulled and abrogated by Section 4237 of the Revised Statutes."

Sprague vs. Thompson, 118 U. S. Rep., 94-5.

Freeman vs. The Undaunted, 37 Fed. Rep., 662.

The provisions of the State statute are void for the further reason that they are in conflict with the treaty of December 22, 1815, between the United States and Great Britain. A stipulation in the second article of that convention provides as follows:

"No higher or other duties or charges shall be imposed in any of the ports of the United States on British vessels than those payable in the same ports by vessels of the United States; nor in the ports of any of His Britannic Majesty's territories in Europe on the vessels of the United States than shall be payable in the same ports on British vessels." (Treaties and conventions between the United States and other powers published by the U. S. Government in 1889, p. 411.)

Under this treaty, which is the supreme law of the land, no State can impose any "higher or other duties or charges" on a British vessel in a port of this State than those payable in the same port by vessels of the United States. All vessels owned, registered and licensed in Texas are vessels of the United States. (U. S. Rev. Stats., Sec. 4131.)

The exemption of any vessel from the pilotage at any port in this State inures, under the terms of this treaty, to British vessels

entering and leaving such port. When the Legislature undertook to exempt all vessels owned, registered and licensed in Texas from charges for pilotage, unless for actual service, the benefits of such exemption at once extended, under the terms of this treaty, to British vessels.

Again, when Congress in 1871 (Rev. Stats., Sec. 4444), exempted American steam vessels engaged in coasting trade from the pilot laws of the several States, it thereby annulled the statute of Texas upon this subject, and relieved such vessels from certain pilot charges imposed in that State, and by so doing British vessels became and are entitled to the same exemptions, and the federal license of plaintiff in error entitled him to pilot the same.

Congress undoubtedly has the power to limit the coastwise trade to American vessels and also to exempt such vessels from pilotage or other port charges imposed by the several States; but these are separate and independent subjects, upon either or both of which Congress may legislate. This country's right to control and regulate its coastwise trade is in no way affected by this treaty; but, when Congress exempts any class of American vessels from duties or charges imposed at any of the ports of the United States, the benefit of such exemption inures at once to British vessels at such port. The right to engage in the American coastwise trade is not conferred upon British vessels, but the right to pay "no higher or other duties or charges" in any port of the United States than are paid in the same port by American vessels is guaranteed to British vessels by this treaty. It does not say that British vessels shall pay higher or other duties or charges in ports of the United States than American steam vessels engaged in the coasting trade pay, or that certain classes of American vessels may be exempted from such duties or charges without the same exemptions being extended to British vessels; but provides that in all cases, where American vessels are relieved from any duty or charge in any port of the United States, the same shall

extend to British vessels at that port. The language of this treaty is plain, and, when considered in the light of the international rule of a liberal interpretation of such treaties, there seems to be no doubt as to its meaning and intent. The rights of each nation under this treaty are determined not by the character of business in which the vessel may be engaged, but by the port charges and exemptions to which vessels may be subjected in their respective ports.

The right of the defendants in error to combine and prevent competition in pilotage is presented by the second error assigned. The allegations in the answer, which are admitted by the demurrer, show that the defendants in error, with the intent to prevent competition, have associated themselves together and are monopolizing the pilotage at the port of Galveston of vessels engaged in the transportation of traffic and commence among the several States and with foreign nations; that the combination is in restraint of trade and commerce between the several States and with foreign nations, and that the trade, traffic and commerce passing through the port of Galveston are restrained, hindered and injured by such combination.

The anti-trust law of Congress, passed July 2, 1890, (26 U. S. Stats., 209c, 647) is very broad and comprehensive in its terms. It prohibits all contracts or combinations that are or may be in restrain of trade or commerce, whether they were unlawful at common law or not, and whether they are unreasonably in restraint of commerce or not. (U. S. vs. Freight Ass'n, 166 U. S., 327.) Every contract, combination or conspiracy such as is shown in this case is included within the language of this statute, and, to use the words of the Supreme Court, "no exception or limitation can be added, without placing in the act, that which has been omitted by Congress." (Id., 328.) That defendants in error control and monopolize the pilotage at this port is clearly shown by the record. They seek the equity powers of the Court upon the

theory that they have an exclusive right, not only to the pilotage, but to combine for the purpose of pooling their earnings and preventing competition. As the business or official duties of defendants in error are inseparably connected with interstate and foreign commerce and the instrumentality thereof, Congress has the power to say, and has said by the act above referred to, that all such agreements, combinations and conspiracies which shall restrain trade or commerce by shutting out the operation of the general law of competition, are illegal. (U. S. vs. Joint Traffic Ass'n, 171 U. S., 569.) This is true, whether they act as individuals or as State officials, if the effect be to restrain interstate or foreign commerce, or the instrumentalities thereof, by stifling competition. The State could not, since the passage of this law by Congress, authorize or legalize such a combination. Every agreement affecting pilotage that destroys competition affects interstate and foreign commerce, and is in restraint of trade. (Id., 569.) To apply the language of the Supreme Court in that case, to the case now before the Court, "An agreement of the nature of this one, which directly and effectually stifles competition, must be regarded under the statute as one in restraint of trade." (Id., 577.) The construction of this law came again before the Supreme Court in Addyston Pipe & Steel Co. vs. U. S., 175 U. S., 211, and its scope and effect was again discussed. It was there contended, among other things, that the power of Congress to regulate commerce was limited to its protection from acts of interference by State legislation, or by means of regulations made under the authority of the State by some political subdivision thereof, and did not include the general power to interfere with or prohibit private contracts between citizens, even though such contracts have interstate commerce for their object and result in a direct and substantial obstruction to or regulation of commerce. (Id., 227.) The Court admitted that the chief object of vesting in Congress the power to regulate interstate and foreign commerce

was to prevent unfriendly and discriminating State legislation, yet there was no such limitation of that power as would exclude Congress from legislating on the subject and prohibiting those contracts which in effect regulate interstate or foreign commerce. The combination shown by this record, whether considered as a contract between private individuals or an association of officers authorized by State legislation, acts directly upon vessels, the instrumentality of commerce, and is necessarily a regulation of interstate and foreign commerce. Defendants in error by their association are able to and do deprive the public of the advantages of competition, not only between themselves, but with others. They have a complete monopoly; but if the association only tends to that end, and to deprive the public of any advantage that might result from free competition, it is in violation of this law. Upon this point the Supreme Court says: "All the authorities agree that in order to vitiate a contract or combination, it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition." (Id., 237.)

Northern Security Co. vs. U. S., 193 U. S., 197.

Montague & Co. vs. Lowry, 193 U. S., 38.

The public are interested in not only having competition in the rate of pilotage, but even more in having quick and efficient pilot service. The delay of a vessel in securing the services of a pilot often results in great loss, both in time and money. It is much more important for the public to have competition in the service than in the rate of pilotage. The fact that plaintiff in error offered his services and piloted vessels into port before defendants in error tendered their services, shows that they do not give the public that quick and efficient service that commerce demands and that competition would or might insure.

This law, which is unusually clear and forceful in its provisions and far-reaching in its effects, when considered in the light of its

construction by the Supreme Court, prohibits all contracts and combinations, the effect of which is to create a monopoly or to prevent free competition in traffic or commerce between the States or with foreign nations; or that hinders or impedes the instrumentalities of interstate or foreign commerce. The record in this case shows the Galveston Pilot Association to be such a combination.

Under the third error assigned the following proposition is submitted:

"The State can not declare a trade, profession, occupation or business, to which none of the functions of government attach, to be an office, limit the number of citizens who may hold the same, and prohibit all others, whatever may be their qualifications and fitness, from pursuing such trade, profession, occupation or business. And the provisions of the Texas statute which declares a pilot to be an officer, and limits the number of citizens who can serve as pilots to the defendants in error, and such deputies as they may choose to appoint, are void."

The provisions of the State statute bearing upon this point are as follows:

"ART. 3791 (Rev. Stats.) Said Board of Commissioners shall be authorized, if they deem it advisable, to examine and decide on the qualifications of any branch or deputy pilot whom they find already appointed at the time of their organization; and it shall be their duty to examine each new applicant for the office of branch or deputy pilot, and to decide on his qualifications, recommending to the Governor, where new appointments are proper, such as are meritorious; and it shall also be their duty to examine into any case of alleged or supposed misconduct or inefficiency in branch or deputy pilots; and they shall be authorized, after a due hearing of accusation, testimony and defense, to suspend such pilot if sufficient cause appear, and during such suspension he shall not be allowed to exercise the functions of his office; the Governor shall, however, have power at his will and pleasure to

remove any branch pilot or to reinstate any one of the same who has been suspended by the Commissioners."

"ART. 3792. The Board of Commissioners of Pilots of each port shall require a certain term of residence in the State of Texas, not less than two years, to authorize any person to exercise the functions of branch pilot for their port or said bays; as also to establish a term of probation not exceeding one year, as a deputy pilot, before any person can exercise the functions of branch pilot."

"ART. 3796. The Governor is authorized and required to appoint at each of the ports such number of branch pilots as may from time to time be necessary, each of whom shall hold his office for the term of two years. In case of a vacancy in said office the appointment shall be for the unexpired term."

"ART. 3797. Before entering upon the duties of his office each branch pilot shall enter into bond, with two or more good and sufficient sureties, in the sum of five thousand dollars, payable to the Governor and his successors in office, and conditioned for the faithful performance of the duties of his office. Such bond shall be approved by the Board of Commissioners of Pilots for the port, or if there be no such board, by the County Judge of the County in which the port is situated, and forward to the Governor, to be by him deposited in the office of the Secretary of State. Each pilot shall also take and subscribe the oath of office prescribed in the Constitution, which shall be endorsed on said bond, and together with the bond shall be recorded in the office of the Clerk of the County Court of the county in which such port is situated before being forwarded to the Governor; and certified copies of said bonds, under the hand and seal of the County Clerk, may be used as evidence in all the courts with like effect as the originals."

"ART. 3798. Each branch pilot may appoint, subject to examination and approval by the Board of Commissioners, two deputies, for whose acts the branch pilot so appointed shall be responsible;

and any branch pilot who shall appoint a deputy without the approval of said board, shall forfeit his own appointment; and the said board shall have authority to restrict all deputy pilots from piloting over the bar vessels of over a certain draught of water."

This statute, as construed by the highest courts having civil jurisdiction in Texas, confers upon defendants in error an exclusive right to carry on pilotage at the port of Galveston, and denies to all other citizens of the State and of the United States, whatever ther qualifications may be, the right to pursue their trade, occupation or business as a pilot, except such as defendants in error may see proper to deputize and permit to serve for one year. This statute limits the number of deputies that may be appointed and leaves it optional with branch pilots whether any deputies shall be appointed or not, and if one is appointed, the terms and conditions of the appointment are left to be fixed by agreement between the parties. The Court in Petterson vs. Board of Commissioners, 57, S. W. Rep., 1002, held that no one can be examined by the Board of Pilot Commissioners and recommended to the Governor for appointment as a branch pilot, or be appointed by the Governor, unless he has served under one of the branch pilots for one year. The authority of the Governor to appoint, and the right of the Board of Commissioners of Pilots to examine and recommend, are both dependent upon the appointment of deputies by the existing pilots. Thus the Legislature has limited the number of deputies and undertaken to delegate to defendants in error the power to select and limit the number of men who can become qualified to serve as branch pilots. Such a limitation and delegation of authority by the Legislature is illegal, whether a branch pilot be an officer of the State or not.

Willis vs. Owens, 43 Texas, 41.

People's R. Co. vs. Memphis R. Co., 10 Wall., 50.

Cooley's Constitutional Limitations (6th ed.), 137 and note 1.

This statute is also unconstitutional, because it "deprives" all citizens of the State of the "liberty" of pursuing one of the industrial avocations of life, takes from him the "property" which every man has or should have in his labor, and (if a pilot is an officer) disfranchises him from holding an office, without "the due course of the law of the land." These principles of the fundamental rights of the citizens of every free government are forcefully stated by the Supreme Court of Texas, in Brenham vs. Water Co., 67 Texas, 560, in this language:

"A grant which gives to one or an association of persons an exclusive right to buy, sell, make or use a given thing or commodity, or to pursue a given employment, creates a monopoly." And, "The allowance or creation of such exclusive right is contrary to the spirit of the Constitution of the State." (Id., 566.)

It is contended that the position of branch pilot is a public office, and therefore the Legislature can prescribe the duties and limit the number of persons who shall enjoy the privileges attached thereto.

A pilot is a seaman authorized by law to act as an officer of a ship in conducting her into and out of a port. His duties require that he should be able to navigate and manage a ship and have a knowledge of the harbor for which he has been licensed.

Hobart et al. vs. Drogan et al., 10 Pet., 123.

A commission from the State and a license from the United States government do not confer upon a pilot the right to perform any governmental functions; they simply authorize him to pursue his occupation, profession or calling within a certain locality, and this is all the statute should mean when it speaks of "the office of branch and deputy pilot." An office is a public charge or trust conferred by law for public purposes. A portion of the sovereignty of the country attaches to it, and it must pertain to the legislative, executive or judicial department of the government.

(Texas Const., Art. II, Sec. 1.) The duties of a pilot pertain to neither.

Dean et al. vs. Healy, 66 Ga., 503.

Navigation Laws of the U. S., 1899, p. 53.

The Court of Criminal Appeals of Texas, in construing this statute, says: "We are inclined to the view that a branch pilot, though appointed by the Governor, is not a public officer at all. His is merely an employment on account of his skill, and the Governor, for the advantage of commerce, and to regulate the business, grants a license to pursue the vocation. In pursuance of his employment, he exercises none of the sovereign power of the State, nor is he paid by the State, nor are his duties prescribed by any law of the State. He is merely a navigator,—one who is or ought to be familiar with taking charge of a ship, and taking it into or out of the port at the particular place where he is engaged in the business.

18 Am. & Eng. Ency. of Law, 444.

U. S. vs. Forbes, 1 Crab., 558; Fed. Cas. No. 15, 129.

Dean vs. Healy, 66 Ga., 503.

However, it is not necessary to hold that a branch pilot is not an officer of this State, and it may be that the view entertained by the Court of Civil Appeals at the present Galveston term, in the mandamus proceeding of Petterson vs. Board, 57, S. W. Rep., 1002, is correct in this regard. But, if it be conceded that a branch pilot is some sort of an officer of this State, and not a mere licensed employe; such as physician or lawyer, then it by no means follows that he is an executive officer of the State. An "executice officer" is defined to be one whose duties are mainly to cause the laws to be executed and obeyed. (Bouv. Law Dict.) An executive officer of the State is one whose duty it is to execute the laws of the State. (19 Am. & Eng. Ency. of Law, 391.) If we turn to the act creating branch pilots, we find no law of the State they are to execute. They are simply appointed to exercise their

employment or skill as pilots. These duties are prescribed by the laws of navigation, and he is merely expected, on account of his familiarity with the harbor, to steer the vessel safely into or out of port.

But we need not refer to this general definition as to who constitute executive officers of this State. Here the Constitution settles this question. Sec. 1, Art. IV, prescribes who are the executive officers of this State. It will be seen that their functions are of a high character, and certainly far transcend the duties of a branch pilot, which are prescribed by no statutory law. (Petterson vs. The State of Texas, 58 S. W. Rep., 100.) These reasons, which are from the highest court in Texas having criminal jurisdiction, apply with equal if not greater force in showing that a pilot is neither a legislative nor a judicial officer of this State. (Const., Art. II, Sec. 1.)

A State officer is one who is invested with a part of the sovereign powers of the State for the purpose of discharging some of its governmental functions. The State may prescribe the qualifications, duties, tenure and compensation of such officer, and fix the number of those who shall exercise the duties and powers that attach to such office. But it can not take from a citizen the right to pursue an occupation, profession, calling or business to which none of the functions of government attach by simply designating it an office.

If a pilot is a State officer, exercising a part of the sovereign powers of the State, then his rights as such can not be limited, regulated or taken away by Congress. Under the laws of the United States all pilots of steam vessels, whether they hold a commission from the State or not, are required to be examined and licensed by a federal board. (U. S. Rev. Stats., Sec. 4438;) (Sec. 4442, Act of Congress, Feb. 28, 1871.) By the same act he is required to take an oath that he will perform all the duties required of him by law. As Congress, under the Constitution, has control

over pilots and pilotage and has passed these acts, it would seem that a branch pilot owes his right to exercise his duties primarily to the license issued by authority of the federal government rather than to a commission issued by the Governor of the State. If he is an officer, as held by the Court of Civil Appeals, then he is *a Federal* and *not a State* officer, as his duties and tenure of office are dependent upon the will of Congress.

Under such conditions, a pilot can not be said to be a State officer, intrusted with the discharge of any of the duties pertaining to a State government. It will be seen that the two highest courts in Texas differ as to whether he is a State officer or not, and that the right of the defendants in error to maintain this suit is based upon the hypothesis that a pilot is a State officer.

U. S. vs. Hartwell, 6 Wall., 385.

Atty. Gen. vs. Drohan, 169 Mass., 534.

Shelby vs. Alcorn, 36 Miss., 273.

Vance vs. W. A. Vandercook Co., 170 U. S., 438.

The State can not take from a citizen who is a skilled seaman, and who possesses all of the qualifications necessary to pilot a vessel, his natural right to pursue his occupation. When it undertakes to limit the number of persons who may pursue such an occupation by prescribing such arbitrary and prohibitory conditions as are found in this statute, it thereby deprives the citizen of the "liberty" and "property" guaranteed him by Sec. 1, Art. XIV, of the Constitution of the United States.

The State statute is invalid, because:

1st. It abridges the privileges and immunities of a citizen of the United States.

2d. It deprives plaintiff in error of his liberty and property without due process of law.

3d. It denies to plaintiff in error the equal protection of the law.

This statute is in effect a regulation of interstate and foreign commerce and the instrumentalities thereof. Its restrictions and

limitations upon the liberty of plaintiff in error to act as a pilot are not only an abridgment, but a deprivation of the privileges and immunities guaranteed him as a citizen of the United States.

This amendment to the Constitution for the first time in the history of the country established a definition of what shall constitute citizenship of the United States, and then declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." What are the privileges and immunities guaranteed by this provision of the Constitution to citizens of the United States has never been authoritatively determined, and the extent of its application is difficult to define. The privileges and immunities here referred to, says the Supreme Court, in Slaughter House cases, 16 Wall., 79, must "owe their existence to the Federal government, its national character, its Constitution, or its laws." The right to regulate interstate and foreign commerce and the instrumentalities by which such commerce must be transported is derived directly from the commercial clause of the Federal Constitution, as is also the right to enter the harbors and to use the navigable waters of the United States. (The Fourteenth Amendment, by Brannon, 83.) The right to pilot vessels engaged in interstate or foreign commerce into and out of the ports of this State is a privilege guaranteed citizens of the United States by this clause of the Constitution and can not be destroyed by the State. The statute of Texas requires all citizens, except defendants in error, whatever may be their qualifications, to serve as a deputy under one of the branch pilots, and then leaves it optional with the branch pilot whether he will appoint a deputy or not. The right to prescribe reasonable rules by which the qualifications of a citizen to perform the duties of a pilot may be ascertained are conceded; but such rules must not be so restrictive as to prevent citizens whose qualifications are undisputed from exercising their right to navigate, or to aid others in navigating, the navigable waters of the United States.

In passing upon the right of the State to prescribe the qualifications of locomotive engineers engaged in hauling interstate commerce, the Supreme Court of the United States, in Smith vs. Alabama, 124 U. S. Rep., 480, says: "It (statute) requires that every locomotive engineer shall have a license, but it does not limit the number of persons who may be licensed nor prescribe any arbitrary conditions to the grant." This implies that, while a State may regulate such an occupation, it can not, under the guise of regulating, abridge the privileges of a citizen so as to prohibit his pursuing such occupation, if he possesses the requisite qualifications to perform its duties.

This section of the Federal Constitution also provides: "Nor shall any State deprive any person of life, liberty or property without due process of law." Under this clause, every person within the jurisdiction of the United States is guaranteed the liberty to make a living in any lawful business. He has an inalienable right to apply his labor and property in his pursuit of happiness, and "the equal protection of the laws is a pledge of the protection of equal laws." (Yich Wo vs. Hopkins, 118 U. S., 356; 82 Fed. Rep., 833.)

The Supreme Court of the United States, in Powell vs. Pennsylvania, 127 U. S., 684, speaking through Justice Harlan, assents to the general proposition that the Fourteenth Amendment to the Constitution of the United States guarantees to the citizen the right to enjoy, upon terms of equality with all others in similar circumstances, the privilege of pursuing any ordinary calling or trade.

The principle we here invoke is forcibly stated by Fields, J., in his concurring opinion in Butchers' Union Co. vs. Crescent City Co., 11 U. S., 757-8. He says: "In this country it has seldom been held, and never in so odious a form as is here claimed, that an entire trade and business could be taken from citizens and vested in a single corporation. Such legislation has been regarded

everywhere else as inconsistent with civil liberty. That exists only where every individual has the power to pursue his own happiness according to his own views, unrestrained, except by equal, just and impartial laws. * * * With what intense indignation would a law be regarded that should, in like manner, turn over the common trades of the community to a single corporation. I can not believe that what is termed in the Declaration of Independence a God-given and an inalienable right can be thus ruthlessly taken from the citizen, or that there can be any abridgement of that right except by regulations alike affecting all persons of the same age, sex and condition. It can not be that a State may limit to a specified number of its people the right to practice law, the right to practice medicine, the right to preach the Gospel, the right to till the soil, or to pursue particular business or trades, and thus parcel out to different parties the various vocations and callings of life. The first section of the Fourteenth Amendment was, among other things, designed to prevent all discriminating legislation for the benefit of some to the disparagement of others."

In the same case Justice Bradley, speaking upon the powers of the Legislature of a State to create a monopoly, says: "To follow any of the common occupations of life is an inalienable right. * * * To deny it to all but a few favored individuals, by investing the latter with a monopoly, is to invade one of the fundamental privileges of the citizen, contrary not only to common right, but, as I think, to the express words of the Constitution." (Id., 762.)

Again he uses this language: "The ordinary pursuits of life, forming the large mass of industrial avocations, are and ought to be free and open to all, subject only to such general regulations applying equally to all as the general good may demand; and the grant to a favored few of a monopoly in any of these common callings is necessarily an outrage upon the liberty of the citizen

as exhibited in one of its most important aspects—the liberty of pursuit." (Id., 763.)

This principle, as stated by Justices Bradley and Harlan, is expressly approved by the Supreme Court in Allgeyer vs. Louisiana, 165 U. S., 589-591. In that case the Court also says: "The liberty mentioned in that amendment (Fourteenth Amendment of the Constitution of the United States) means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoymnt of all of his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livlihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

Judge Miller, in delivering the opinion of the majority of the Court in the Slaughter House cases, 16 Wall., 36, expressly held that the statute under discussion did not deprive the butchers of the right to exercise their trade, or impose upon them any restrictions incompatible with its successful pursuit. (Id., 60.) It did not prevent them from doing their own slaughtering. On the contrary, the Slaughter House Company was required to permit any butcher who wished to do so to slaughter in their houses, and they were bound to make ample provisions for the convenience of those who wished to slaughter, prepare and sell their own meat. A reasonable compensation was allowed for the use of the accommodations furnished. (Id., 61.) The right of the State to prescribe the locality in which the slaughtering should be done was held to be a State police regulation for the protection of the health and comfort of the people within its powers. In the statute under discussion neither the public health nor morals of the people are involved, but merely the right to follow an ordinary industrial

occupation, the liberty to pursue which the State can not deprive plaintiff in error of.

Upon this point Judge Cooley says: "The general rule undoubtedly is, that any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others. This general right can not be taken away." Cooley's Constitutional Limitations, 6th ed., 744-5.)

The Court of Appeals of New York, in People vs. Marx, 99 New York, 386, says: "No proposition is now more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuits, not injurious to the community, as he may see fit."

In Bertholf vs. O'Reily, 74 New York, 515 Judge Andrews says: "The right to *liberty* embraces the right of a man to exercise his faculties and to follow a lawful avocation for the support of life." And Earl, J., *in re* Jacobs, 98 N. Y., 98, says that liberty, in its broad sense, as understood in this country, means "the right of one to use his faculties in all lawful ways; to live and work where he will; to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation."

Judge Brennon, in his work on "The Fourteenth Amendment," 109-115, discusses ably the meaning of the word "liberty," as used in this amendment, and cites many authorities in support of the proposition we are here contending for.

State vs. Goodwill, 33 W. Va., 139.

State vs. Julow, 129 Mo., 172.

Ex parte Kubach, 85 Col., 274.

Leep vs. Railway Co., 58 Ark., 407.

Wally vs. Kennedy, 2 Yerg., 554.

Commonwealth vs. Perry, 155 Mass., 117.

Frorer vs. People, 141 Ill., 171.

The monopolistic features of this statute are also in violation of that clause of the section of the amendment which provides,

"No State shall deny to any person the equal protection of the law." The grant of the privilege of piloting at the port of Galveston to twelve men, and then conferring upon them the authority to determine who, if any, shall possess the qualifications required by the statute before he can be appointed a pilot, is a denial of the equal protection of the law guaranteed by this clause.

Connolly vs. Union Sewer Pipe Co., 184 U. S., 558-567.

It is the basic principle of a free government, as declared in the Magna Charta, and the fundamental principle upon which our national and State governments were formed. It is concisely expressed in the words "Equal rights to all, ,special privileges to none." If the right of a citizen to follow an ordinary calling, whatever his qualifications therefor may be, can be taken from him and conferred upon a monopoly, then it seems to us that the language of Justice Bradley in the concluding paragraph of his opinion in Butchers' Union Co. vs. Crescent City Co., 111 U. S., 766, is particularly applicable to the case disclosed by this record, viz:

"If by legislative enactment they (monopolies) can be carried into the common avocations and callings of life, so as to cut off the right of the citizen to choose his avocation, the right to earn his bread by the trade which he has learned; and if there is no constitutional means of putting a check to such enormity, I can only say that it is time the Constitution was still further amended."

It is well settled that the power over the subject of pilots and pilotage is conferred upon Congress by the commercial clause of the Constitution. (U. S. Const., Art. I, Sec. 8, clause 3.) This power is without limit, and it seems to us is exclusive. The Federal government is one with enumerated powers that are specified in the Constitution, and when it was adopted by the States, it became a compact that can not be added to or taken from, except in the manner provided for in the instrument itself. The sovereign powers conferred upon Congress by this compact can not be dele-

gated or surrendered without impairing our system of government. The right of Congress to surrender its powers would carry with it the ability to destroy the government.

How far Congress can adopt the machinery of the State governments to exercise any of its powers, or how far the States in the absence of congressional legislation have authority to exercise any of the powers delegated to Congress, seems not to have been determined. The sovereign powers reserved to the States and those delegated to the Federal Government are separate, and should be independent the one of the other. It has been recognized that the States, in the absence of Congressional action, have authority to regulate the subject of pilots and pilotage, although the lines of argument by which this conclusion has been reached are by no means uniform.

Cooley vs. Board of Wardens, 12 Howard, 299.

Gibbons vs. Ogden, 9 Wheaton, 207.

S. S. Co. vs. Joliffe, 2 Wallace, 459.

Ex parte McNeil, 13 Wallace, 236.

Wilson vs. McNamee, 102 U. S., 572.

See in this connection the reasoning in Vance vs. Vandercook Co., 170 U. S., 438.

At the time these decisiois were rendered Congress had not, except when it passed the act of 1789, legislated upon this subject, and most of the harbors and rivers of the United States were only known to the local pilots. These conditions are now changed. Congress has passed a law prohibiting the States from adopting any regulations or provision discriminating in the rate of pilotage between vessels or ports of other States. It has passed laws regulating the examination and licensing of pilots of steam vessels, and prescribed their duties; also laws assuming jurisdiction over the harbors and navigable rivers of the United States, and is now spending millions of dollars annually in making surveys and charts, erecting buoys, removing obstructions and otherwise im-

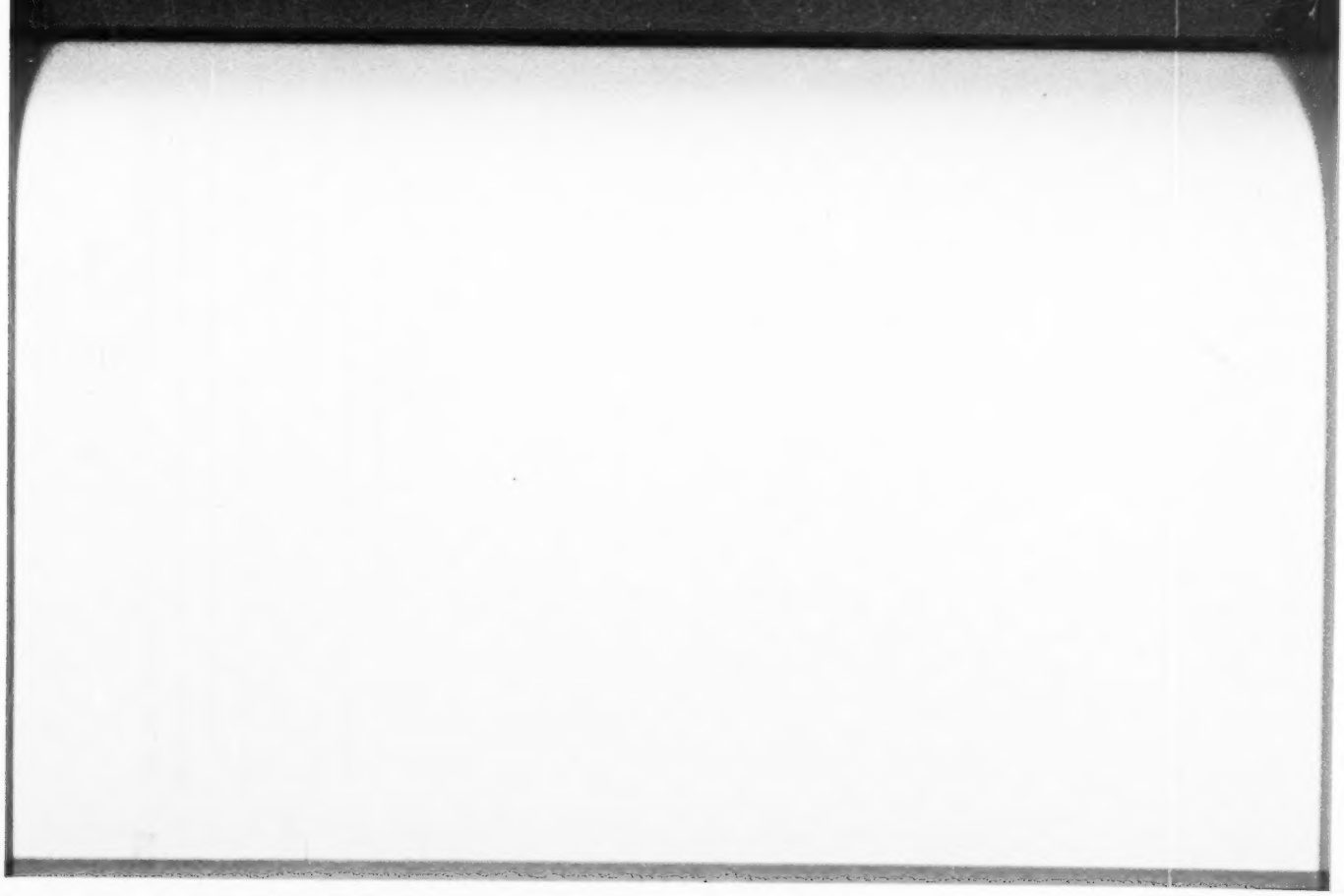
proving our waterways with a view of lessening the dangers and expenses of navigation and furnishing aids to commerce.

Under these conditions, it would seem that the statute of Texas, never having been adopted by Congress and being discriminative and monopolistic in its provisions, is in contravention of the Constitution and laws of the United States and void, and that the judgment of the Court below should be reversed.

Respectfully submitted,

WALTER GRESHAM,

Attorney for Plaintiff in Error.



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IN THE

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OCTOBER TERM, 1904.

No. 42.

OTTO OLSEN, PLAINTIFF IN ERROR,

vs.

A. D. SMITH, L. LUTH, L. BEST, ET AL.,
DEFENDANTS IN ERROR.

In Error to the Court of Civil Appeals, Fourth Judicial District of Texas.

JAMES B. & CHARLES J. STOBBS,
Counsel for Defendants in Error.

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In Error to the Court of Civil Appeals, Fourth Judicial District of Texas.

STATEMENT.

This suit was brought December 4, 1900, by defendants in error, who were the pilots at the port of Galveston, appointed by the Governor of Texas and qualified in accordance with the pilot laws of that State, and who claimed the exclusive right to pilot in and out of the port of Galveston vessels bound to and from foreign ports. They alleged that plaintiff in error was offering his services and acting as a pilot for such vessels without right or authority so to do, which action interfered with the performance of their official duties and prevented them from earning the compensation allowed by law, and was a practical denial of the right of the State of Texas to enact and enforce a pilotage system, to designate efficient and responsible pilots, and to regulate the pilotage service in the interest of commerce and with a view to the safety of life and property.

An injunction was asked to restrain Olsen from piloting or attempting to pilot vessels engaged in foreign commerce. (Tr., 1-3.)

Demurrers to the petition questioned the validity of the pilot laws of the State of Texas upon grounds hereinafter stated. The answer averred that plaintiff in error was a citizen of the United States and of Texas, and had resided more than ten years at the port of Galveston; that he was a skilled seaman and a pilot of coastwise steam vessels by virtue of a license under the laws of the United States. That he was familiar with the harbor and was qualified to act as a branch pilot, but that the board of pilot commissioners of the port had refused to examine him as to his qualifications, for the reason that he had not served as a deputy pilot for the term of one year. He admitted that each of the defendants in error was a branch pilot, and, as such, was authorized to offer his services as a pilot to any vessel entering or leaving the port of Galveston, but complained that petitioners had wrongfully refused to appoint him a deputy and thus put him in order for appointment as a pilot.

Further, that they had associated themselves as partners to maintain the rates of pilotage and counteract free competition in such service, and that such association was, therefore, in restraint of trade.

He declared that the only vessels which he had served or offered to serve as pilot were British vessels, and that under a treaty between the United States and Great Britain he had the right to pilot such vessels in and out of the harbor. Also, that defendants in error could not lawfully take from him his right to enjoy the liberty to pursue his calling, profession or trade as a pilot.

To this answer defendants in error demurred, and upon the hearing, November 11, 1901, their demurrers were sustained, and those of plaintiff in error were overruled, and the former

were adjudged entitled to the relief prayed for and the temporary injunction was made permanent. (Tr. 8).

The Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, on April 23, 1902, affirmed the judgment of the District Court, after modifying it in a respect immaterial to this proceeding. (Tr. 14-20).

June 25, 1902, the application of Olsen to the Supreme Court of the State of Texas for a writ of error was refused. (Tr. 24).

This was an approval by the final tribunal of Texas of the conclusion of the appellate court.

The case was thereafter brought to this court. (Tr. 25-29).

As will be seen, the validity of the pilot laws of the State of Texas is involved in this case. They are assailed upon several grounds, namely:

1. That the exemption therein of certain vessels from compulsory pilotage does not include all coastwise steam vessels, as provided by the act of Congress, and that, therefore, the entire State law is void.

2. That British vessels, the only ones served by Olsen, are exempt under a treaty from compulsory pilotage and as the Texas statutes do not recognize such exemption, they are, for that reason, void.

3. That the partnership between defendants in error, and their refusal to appoint Olsen as deputy, are in restraint of trade and in violation of the anti-trust laws of the United States.

4. That the Texas law is repugnant to the first section of the fourteenth amendment of the Federal Constitution in that it denies to plaintiff in error the right to pursue the occupation of pilot without prior service as a deputy and appointment by the Governor in pursuance of the State statute. (Tr. 30).

We will discuss these objections in the order in which they appear in the brief of plaintiff in error.

The statutes are copied in the brief of the other side and are

synopsized in Judge Gill's opinion in the Petterson case appearing in the appendix.

Do the exemptions in one article of the statutes annul the others?

The first assignment charges that the Texas law is invalid because it exempts certain vessels from its provisions. These exceptions are of all vessels of twenty tons and under; of all owned and registered in the State of Texas when arriving from or departing to a port of the State; of all vessels of seventy-five tons and under, owned and licensed for the coasting trade in any port of the United States when bound to or from any port of the State, and of all vessels of seventy-five tons and under owned and licensed in the State when arriving from or departing to any part of the United States. (Brief of plaintiff in error, 6, 7, 8, 9).

The foregoing classes of vessels are free from any charge of pilotage, except for actual service, whereas the act of Congress of 1871, U. S. Rev. Stat., Sec. 4444, only exempts coastwise steam vessels from taking a State pilot. The exemptions of the Texas statute are not confined to steam vessels, but are limited to those of a small tonnage, whether steam or sail.

Replying to the argument upon this point we quote from the opinion of the Court of Appeals in this case, delivered by Chief Justice James. (Tr., 16).

"There can be no question that the acts of Congress on the subject are paramount and nullify at least so much of our statutes as are inconsistent with them. Appellant insists that the several provisions of our pilot law constitute one entire scheme and the intent of the legislature to exempt Texas vessels engaged in strictly State commerce, and to include all coastwise vessels over seventy-five tons burden, are so interwoven and connected that it is impossible to separate them, or to declare that the legislature would have enacted a law at all if they had in view the illegality of such particular exemption and inclusion. That the objection-

able provisions are separable from the rest of the provisions seems to us too plain for discussion.

"The invalid provisions relate only to coastwise vessels, as distinguished from foreign ones; therefore, the subject matters are distinct as between these classes of vessels. It is our opinion that these minor provisions with respect to certain coastwise vessels were not of prime importance in the mind of the legislature, in view of the settled policy of this State since 1846 to establish pilot regulations for its harbors. We, therefore, can not accede to the proposition that it is evident or even reasonably inferable that the legislature would not have enacted the provisions in reference to foreign vessels alone.

"The Alameda, 32 Fed., 333.

"Reagan vs. Farmers' Loan & Trust Co., 154 U. S., 362.

"Tel. Co. vs. The State of Texas, 62 Texas, 630."

This was approved by the Supreme Court of Texas.

In Reagan vs. Farmers' Loan & Trust Co., 154 U. S., 362; 38 L. E., 1023, cited by the Court of Appeals, this Court, writing through Mr. Justice Brewer, announces that "it is familiar law that one section or part of an act may be invalid without affecting the validity of the remaining portion of the statute. Any independent provision may be thus dropped out if that which is left is fully operative as a law, unless it is evident from a consideration of all the sections that the legislature would not have enacted that which is within independently of that beyond its power."

With this rule in mind, we have no difficulty in concluding that the legislature of Texas would have established pilot regulations requiring, among other things, that all vessels engaged in the foreign trade, which are generally of large size and draft, should avail themselves of pilots familiar with the bars, shoals, channels, and harbor in entering or leaving port, whether coastwise steam vessels were exempted by Congress or not, and that such pilots

should be appointed and controlled by the State, where Congress had not provided otherwise.

In fact, when these statutes were first passed in 1846 the larger part of the coasters were of small burthen, and the law bears the evidence of the disposition on the part of its framers to leave it optional with the entire coasting trade to accept the services of the port pilots. It is not unreasonable to suppose that the exemptions would have been extended at a later date to include other coasters if the matter had been called to the attention of the legislature.

U. S. Rev. Stat., Sec. 4444, only goes a step further, applying this option to all steam vessels in the coastwise trade. The allowed and the prohibited paragraphs of the State law are plainly separable and distinct, and it is only when all the provisions are so connected in meaning and interdependent that it cannot be presumed that the legislature would have passed one without the other that the entire statute will be disregarded.

Keokuk N. L. P. Co. vs. Keokuk, 95 U. S., 89; 24 L. E., 381.

Spraigue vs. Thompson, 118 U. S., 90; 30 L. E., 115, relied upon by plaintiff in error, was a case where pilotage was claimed under a Georgia statute against a coastwise vessel. It has no application to a vessel in the foreign trade. This was expressly decided by Mr. Justice Field on circuit after he had taken part in the decision of Spraigue vs. Thompson.

It was urged in the Alameda, 32 Fed., 333, that, as the California code discriminated with respect to coasting vessels, the entire pilot law of that State was void, because the discriminations were within the prohibition of the Federal statute. Judge Field thus demonstrates the unsoundness of the claim:

"It does not seem to me to be a reasonable inference that, because an exemption was thus made by the legislature in favor of certain coasting vessels between the ports of the State and between its principal port and ports on the coast in Oregon,

Washington and Alaska, it would not have allowed half pilotage in any case, even where the vessel to which the service of a pilot were tendered was coming from a foreign port, had not this exemption of coasting vessels from such charges been allowed. There is no such necessary connection between the two things as would justify the inference that the charge would not have been allowed in the one case if the exemption were not permitted in the other.

"The Federal statute prohibits regulations by any State making a discrimination in the rates of pilotage or half pilotage between certain vessels engaged in the coasting trade, or against vessels propelled in whole or in part by steam, or against National vessels and it abrogates all existing regulations thus discriminating. But it has no further operation; it in no respect impinges upon any other regulation, or touches the general system of pilotage or half pilotage, with respect to vessels engaged in foreign commerce. The prohibited discrimination, if previously made, is abrogated; if subsequently made, it is inoperative to defeat regulations otherwise valid.

"Discriminations in rates of pilotage in favor of certain vessels engaged in the coasting trade are, by their terms, necessarily limited, and could, therefore, never have been designed to affect the pilotage or half pilotage of vessels engaged in foreign commerce. The discrimination as to coasting vessels being invalid, section 2466 stands, as respects other vessels, in full force. Whether the coasting vessels are, by the invalidity of the discrimination as to them, brought under the operation of section 2466 is a question not necessary to determine. It may be said that the discrimination indicates the intent of the legislature that such vessels should be exempt from half pilotage; but it may be also said that it is to be presumed that the legislature only intended the discrimination in case it could be lawfully made. We should hesitate to attribute to it a designed disregard of the

Federal statute. But, as said above, the question is not before us for decision. The case is essentially different from Spraigue vs. Thompson, 118 U. S., 90. There it was sought to charge a coasting vessel which was (not) excepted from pilot charges by the Code of Georgia; here it is sought to except from such charges a vessel engaged in foreign commerce, because of an exemption by the Code of California in favor of certain coasting vessels—an exemption contained in an independent section."

The opinion of Judge Hoffman in the lower court, sustained on appeal, is of similar import. The Alameda, 31 Fed., 366.

The Undaunted, 37 Fed., 662, also cited by defendant, is not inconsistent with the Alameda. The Undaunted was an American vessel which refused to employ a pilot when leaving the port of San Francisco for the port of New York, and it was held that the statute of California allowing half pilotage in such a case was void, because in conflict with section 4237 of the Revised Statutes of the United States, which provides that "No regulations or provisions shall be adopted by any State which shall make any discrimination in the rate of pilotage or half pilotage between vessels sailing between the ports of one State and vessels sailing between ports of different States and all existing regulations or provisions making any such discrimination are annulled and abrogated."

This decision was by Judge Sawyer of the United States Circuit Court of the Northern District of California. The previous judgment in the Alameda case was by the same court, Justice Field presiding. Judge Sawyer held that the Undaunted, being a vessel bound from one port in the United States to another, was not liable for half pilotage, under the California statute, because the latter was contrary to the act of Congress in that respect, but it is not intimated that the conclusion reached by Judge Field upholding that part of the California statute which related to vessels engaged in foreign commerce was not sound.

There is a clear difference between the cases, and Judge Sawyer, it seems to the writer, impliedly admits that if the ship had been bound to a foreign port, it would have owed half pilotage. He says: "It is claimed, however, that, as this vessel sails around Cape Horn to New York, and may touch at some foreign port on the way, it is not 'coasting' between the two ports of San Francisco and New York. Should this be so, the provision of the Revised Statutes does not say 'coasting,' but 'vessels sailing' between the ports of the States. This vessel is clearly within the terms of the provision." While it was not necessary to go further, the inference from the above is that if the ship had been bound to a foreign port, it would not have been exempt.

Again, as pointed out in the Alameda case, the exemption of the statute was contained in an independent section, as is the Texas exemption, and it cannot be doubted that the legislature of Texas would have required all vessels in the foreign trade to comply with the State pilot laws, or pay half pilotage, whether such requirement was or was not intended to apply to those in the domestic trade.

In other words, the State statute, though invalid as to article 3801, making certain exceptions, is operative as to the remainder, because the latter would obviously have been enacted independently of the exceptions.

Plaintiff in error referred, in the lower court, to Western U. T. Co. vs. The State of Texas, 62, Texas, 630, which clearly supports our view. Judge Stayton adopts this language of Judge Cooley (page 634): "If when the unconstitutional portion is stricken out, and that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must stand."

We ask the court to consider also whether the question thus presented can be raised in this case. The only invalidity of our

statute is an attempted discrimination between different coasters. The petition refers only to vessels in the foreign trade. They cannot be injured or affected by an illegal discrimination between coasting vessels. They are merely subjected to a just and necessary charge, which, if the court should declare it to be invalid, because of the regulation regarding coastwise vessels, the legislature could and doubtless would again establish, unaccompanied by the exemptions.

The objectionable provisions are not so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature, and there can be no question in the case before us that the legislature intended to subject foreign vessels and those engaged in foreign trade to this charge. The invalidity of a part of the State statute with respect to coasters should not and does not annul the rest of the statute, which, it is evident, the legislature intended as the law to be applied to foreign shipping, whether domestic vessels should or should not be subject to pilot charges.

In Loeb vs. Trustees of Columbia Township, 179 U. S., 490; 45 L. E., 290, the Supreme Court observes:

"The point is not whether the parts are contained in the same section, for the distribution into sections is purely artificial, but whether they are essentially and inseparably connected in substance,—whether the provisions are so interdependent that one cannot operate without the other."

Clearly, the rule requiring ships in the foreign trade to take a pilot, or pay half pilotage, can and was intended to be applicable to such vessels, in any event, regardless of the rules then or thereafter prescribed for domestic or coasting craft. The State exemption of such is broad, including many that the Federal act omits, and it is apparent that the legislature would not have hesitated,

if called to its attention, to have made the State exemptions or options conform to the National.

Tiernan vs. Rinker, 102 U. S., 123; 26 L. E., 103; same case, 47 Tex., 393.

T. & P. Ry. Co. vs. Mahaffey, (T. C. A.) 10 T. C. R., 779.

All depends upon the intention of the legislature as shown by the general scope of the law.

Florida Central Ry. vs. Schutte, 103 U. S., 118; 26 L. E., 335.

It is only when the provisions of a statute are so mutually dependent upon each other as conditions, considerations or compensations for each other as to warrant the belief that they were intended as an entirety, and that the lawmakers would not have enacted any part without including all of it, that such statute will be declared wholly void, when a part of it is in conflict with the supreme law.

In Little Rock & Ft. S. R. Co. vs. Worthen, 120 U. S., 102; 30 L. E., 590, this court says: "It is only when different clauses of an act are so dependent upon each other that it is evident the legislature would not have enacted one of them without the other—*as when the two things provided are necessary parts of one system*—the whole act will fall with the invalidity of one clause. When there is no such connection and dependency, the act will stand, though different parts of it are rejected."

This court will accept the construction of the Texas courts in such cases as this.

Assuming that as an original question this court might class the Texas statute with that of Georgia, discussed in the case of Spraigue vs. Thompson, *supra*, we advance this proposition in the language of Mr. Justice Harlan, in giving this Court's opinion in Cargill Co. vs. Minnesota, 180 U. S., 466; 45 L. E., 626: "The questions just stated are questions of local law, and in determining whether the statute violates *any right secured by the Federal Constitution* we must, in the particulars named,

accept the interpretation put upon it by the State court." The italics are ours.

"In Tullis vs. Lake Erie & W. R. Co., 175 U. S., 348; 44 L. E., 192, the question was as to the constitutionality of a statute of Indiana relating to railroads and other corporations, except municipal corporations. The Supreme Court of that State held that the statute was capable of severance, and that its provisions as to railroads were not so connected in substance with the provisions relating to other corporations that their validity could not be separately determined. This court followed that view, declaring it to be an elementary rule that it should adopt 'the interpretation of a statute of a State affixed to it by the court of last resort thereof.'"

"See also Missouri P. R. Co. vs. Nebraska, 164 U. S., 403; 41 L. E., 489.

Chicago, M. & St. P. R. Co. vs. Minnesota, 134 U. S., 418; 33 L. E., 970.

St. L., I. M. & S. R. Co. vs. Paul, 173 U. S., 404; L. E., 746."

"Pursuant to this rule, and without expressing any opinion on the question, we assume that the provision requiring a license from any person, firm or corporation proposing to engage in the business described in the first section embraces the defendant company; that such provision may stand alone; and that its validity may be determined without reference to other provisions of the statute."

M., K. & T. Ry. vs. McCann, 174 U. S., 586; 43 L. E., 1097, and authorities there cited in Tullis vs. Lake Erie & W. Ry., 175 U. S., 348; 44 L. E., 195, in which Mr. Chief Justice Fuller, delivering the opinion of the court, declines to disregard the interpretation given to a State statute by the court of last resort of the State and, by an adverse construction, *to decide that the State law is repugnant to the Constitution of the United States.*

As to the Treaty:

Is the Texas statute in derogation of the treaty between this country and Great Britain of December 22, 1815? One of its stipulations is as follows:

"No higher or other duties or charges shall be imposed in any of the ports of the United States on British vessels than those payable in the same ports by vessels of the United States; nor in the ports of any of His Brittanic Majesty's territories in Europe on the vessels of the United States than shall be payable in the same ports on British vessels."

In response to this inquiry our Court of Civil Appeals expressed these views: (Trans. 17, 68 S. W., 320; 4 T. C. R., 982.)

"Defendant alleged that all vessels that he had piloted or tendered his services to pilot in or out of the harbor, are British vessels, and that by virtue of said treaty he has the right to do so. The position taken is that because certain United States vessels (coastwise vessels) are relieved, all British vessels are therefore exempt, whether coastwise or foreign. United States vessels engaged in foreign trade have never been relieved and are still subject to the pilot laws of this State, but, says appellant, British ships engaged in foreign trade are nevertheless not subject to them. The meaning of the treaty is evident, viz: That British vessels should have the same benefits accorded United States vessels at American ports, the same and no more or less, and that no discrimination should be made. In respect to British coastwise vessels they are exempt from our statute because United States coastwise ships have been exempted. The exemption has not been extended to American ships engaged in foreign commerce, and until this is done British vessels of the same character are equally subject to our statute."

This decision, like all of those in Texas involving our pilot system, has been approved by the Supreme Court of the State, which is the final tribunal. Under our statutes (R. S. Art. 943)

the refusal of the applications for writs of error, which occurred in those cases, is an approval by the Supreme Court of the conclusions of the intermediate court.

Brackenridge vs. Cobb, 85 Tex., 448.

A fair construction of the extract from the treaty would be that "no higher or other duties or charges shall be imposed in any of the ports of the United States on British vessels than those payable in the same ports by vessels of the United States" engaged in like service, because a vessel of the United States arriving from a foreign country would be amenable to the pilot laws of Texas, and, under the extract from the treaty given above, a British vessel would necessarily be in the same category. Otherwise, the latter would not be required to pay a pilot charge which the American vessel would have to bear. The plain and reasonable import of the treaty is that the vessels of both countries shall be upon an equal footing. The construction contended for by defendant would accomplish the opposite result and would mean an inequality and a discrimination.

When Congress, 1871 (U. S. R. S., Sec. 4444), declared that American steam vessels in the coasting trade should not be subject to the pilot laws of the various States, it did not exempt British vessels, unless, indeed, it could be shown that they were engaged in the coasting trade, and no other or different rights can be claimed for British vessels than those accorded American vessels under like conditions.

The contention that in all cases where American vessels are relieved from any duty or charge in a port of the United States, the same exemptions should extend to British vessels at that port is true, but defendant does not and cannot show that American vessels employed in commerce with foreign countries are exempt from such charges in Texas ports. The vessels of the two countries are upon a parity, as the treaties and laws have been under-

stood and applied for many years, and which construction is the only reasonable and just one.

Hunt vs. Card, 14 Pick., 135.

As to Monopoly:

Plaintiff in error, on page 13 of his brief, argues, in effect, that as his answer charges that the pilots have associated themselves together and are monopolizing the pilotage at the port of Galveston, and that such combination is in restraint of trade, all of which he claims are admitted by our demurrers to his answer, that, therefore, the defense of a violation of the anti-tr[illegible] aw of Congress passed July 2, 1890, is established.

The demurrers assumed to be true only those facts which are sufficiently pleaded, and these facts are neither more nor less than the charge that plaintiffs are partners in receipts and expenses of the service, and that they charge the fees fixed by the commissioners under the law. The exact averments of the answer in this behalf are:

"That petitioners, contriving and intending to counteract the effect of free competition in pilotage at the port of Galveston, and to lessen their labors and minimize the facilities they should offer all vessels entering and departing from said port, and to maintain arbitrarily the maximum rates of pilotage allowed by law, have associated themselves together as partners; that by reason of such association and agreement, they prevent competition and monopolize the pilotage of said port, of vessels engaged in the transportation of traffic and commerce among the several States and with foreign nations; that the combination and agreements of petitioners are in restraint of trade and commerce between the several States and with foreign nations and illegal; that the trade, traffic and commerce passing through the port of Galveston are restrained, hindered and injured by said

combination and the acts of petitioners and the fees charged by them."

To this passage we excepted because it set up no defense and was obscure and uncertain, and consisted mainly of conclusions and not statements of facts. In disposing of this issue, if it may so be termed, the Court of Appeals observed: (Tr. 19.)

"The State, as already stated, may create the office of pilot by the same act it has created the office of Commissioners of Pilots, who decide upon the qualifications of applicants for branch or deputy pilots, and who recommend to the Governor where appointments are proper, such as are meritorious etc. They may for sufficient cause upon hearing suspend a pilot or deputy and the Governor has power at will to remove or reinstate one. The entire subject is under the control of the Governor and the Commissioners. So long as they see fit to retain defendants in error in office as pilots, plaintiff in error cannot question their right to exercise their functions. The very nature of an 'office' is that it gives a monopoly of exercising the official acts pertaining thereto to the incumbent, to the exclusion of others, though equally fit. If they improperly conspire and combine, this might be conduct that would suggest their removal by the Governor, or be cause for suspension by the Commissioners. We cannot see how such acts would, while they are allowed to remain in office, in any manner affect their right to perform its duties or to protect themselves in its emoluments."

This expression is in the footsteps of the Petterson case set out in the appendix. 57 S. W., 1006.

Plaintiff in error complains that the Galveston pilots, *by reason of their association together as partners,* prevent competition, monopolize the duties and emoluments of pilots, maintain rates and restrain commerce.

The first inquiry is, how can a mere partnership accomplish these things? Let us analyze these assertions.

The necessary effect of official incumbency is that the officer shall do the work and receive the recompense, and not others; and, in this sense, every law creating an office or place and providing for the selection of those who shall discharge its duties, debars others not so appointed; so that it comes back to the question, which we will discuss later, as to the right of the State to enact such laws as ours and to provide how many pilots there shall be, and the prerequisites to their appointment.

It is hinted, however, that competition among the pilots themselves is stifled. This is impossible, for the commissioners are clothed with authority (Art. 3793) "to establish regulations respecting the stations whereat and the times wherein they (the pilots) shall be on duty." The board can and does determine what pilots and how many shall be in port to take vessels out and which of them shall be stationed outside to bring vessels in. A fair division of the work and exposure is thus made, in which the pilots themselves have no voice or control.

The charge as to cutting off competition and as to a monopoly are essentially identical. An office is necessarily a monopoly, in a certain sense, as pointed out by Judge Gill, in the opinion in Petterson vs. Board of Pilot Commissioners for Port of Galveston, and if the Governor should increase the number of pilots the facts of "exclusive right" and fees would remain.

How such a partnership violates the anti-trust law is not shown. A safe test as to what constitutes a trust or illegal combination is its ability or tendency to control prices and prevent or lessen competition. The pilot association has for its object the division among its members of the earnings and expenses. It cannot regulate fees, for they are fixed by the pilot commissioners, the statute naming the maximum. (R. S. Art. 3800).

As stated, the commissioners are required "to establish regulations respecting the stations whereat and the times wherein they (the pilots) shall be on duty, with provisions for leave of absence;

as also respecting the class, condition, number and use of pilot boats, and such other minor regulations compatible with the provisions of this title as may be needed for the government of pilots." etc. R. S., Art. 3793.

Thus, the pilots themselves have no voice in determining when or where one or more of them shall be on duty.

So that the lack of competition, if such exists, does not and cannot result from the fact that the pilots have assumed among themselves the relation of partners, as in the discharge of their duties they are under the absolute control of the board of commissioners.

A reading of the law will satisfy the Court that no restraint of commerce or prevention of competition can exist by virtue of any agreement among the pilots themselves, so that plaintiff in error is confined to a criticism of the law itself, for it alone is responsible for the limited number of pilots, and it alone prescribes the maximum rates of pilotage, and generally provides for the regulation of the service by the Commissioners who are responsible to the Governor.

It has been held that the formation of a partnership among all the pilots of the port is not unlawful, but commendable for the reason that by so doing they could relieve each other at stated hours, purchase better boats with their joint funds, and otherwise conduce to better service.

Petterson vs. Board of Pilot Commissioners, (Texas C. C. A.) 57 S. W., 1002.

Jones vs. Clifford, 5 Fla., 510.

Levine vs. Michel, 35 La. Ann., 121.

The Pirate, 32 Fed., 490.

The Dundee, 103 Fed., 698.

Affirmed in 108 Fed., 678.

Mason vs. Ervine, 27 Fed., 459.

An agreement to be in conflict with the anti-trust act must

directly and substantially, and not merely indirectly and incidentally, regulate interstate or foreign commerce.

Mr. Justice Peckham, speaking for the Court in Anderson vs. United States, 171 U. S., 615; 43 L. E., 306, observes:

"It has already been stated in the Hopkins case, above mentioned, that in order to come within the provisions of the statute, the direct effect of an agreement or combination must be in restraint of that trade or commerce which is among the several States, or with foreign nations. Where the subject matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct, or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object.

As is said in Smith vs. Alabama, 124 U. S., 465; 31 L. E., 508, 'There are many cases, however, where the acknowledged powers of a State may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations.' The same is true as to certain kinds of agreements entered into between persons engaged in the same business for the direct and bona fide purpose of properly and reasonably regulating the conduct of their business among themselves and with the public. If any agreement of that nature, while apt and proper for the purpose thus intended, should possibly, though only indirectly and unintentionally, affect interstate trade and commerce, in that event we think the agreement

would be good. Otherwise, there is scarcely any agreement among men which has interstate or foreign commerce for its subject that may not remotely be said to, in some obscure way, affect that commerce and to be therefore void.

"We think, within the plain and obvious construction to be placed upon the act, and following the rules in this regard already laid down in the cases heretofore decided in this court, we must hold the agreement under consideration in this suit to be valid."

Hopkins vs. U. S., 171 U. S.; 43 L. E., 290.

It must be a direct and substantial, and not simply an incidental, regulation of foreign commerce.

Addystone Pipe Co. vs. U. S., 175 U. S., 211; 44 L. E., 143.

If it can be conceived that the co-operation of the Galveston pilots in providing necessary boats and dividing earnings and outlay, and that the action of the Commissioners in fixing rates, times and stations for pilot duty, in any manner affects the interests of foreign traffic, it is only indirectly so, and it is clear that the effect is, or, in the nature of things ought to be, to contribute to prompt, safe and reliable handling of vessels in that trade.

Plaintiff in error does not point out, or in any matter suggest, how such an arrangement can have the tendency to hamper commerce. Upon the contrary, it is plain that such co-operation should enable the pilots to render it more prompt and efficient aid. They require steam vessels for sea duty outside the bar. It may be reasonably assumed that the means of one or a few pilots would be inadequate to the purchase of such an equipment, and it is in the interest of commerce that they should unite their earnings to this end, as well as for a more uniform apportionment of labor and benefits.

Thus the commission, as the statutes command, direct the pilots in all the details of their work, indicating who and what number shall remain upon shore in readiness to take charge of outgoing

vessels, and also those who shall be stationed in the offing to safely guide the course of incoming vessels. At times, the larger number may be needed either in port, or *vice versa*.

The anti-trust decisions of the Federal Supreme Court, cited by plaintiff in error, we do not think apply. They construe "An act to protect trade and commerce against unlawful restraints and monopolies," and hold that agreements between railroad and other companies to maintain rates and prices are unlawful, insofar as they relate to interstate commerce, although the rates and prices so fixed may be reasonable. Where is there any semblance of such an agreement in the instant cause? It could as well be claimed that the legislature could not establish any offices and provide for collection of its fees, if the duties in any way affected commerce between the States and foreign countries. What would be said of quarantine officers, public weighers and the like?

Has the State the right to limit the number of port pilots and require service as a deputy pilot as a condition precedent to appointment as pilot?

The third error assigned is that the statute of Texas abridges the privileges or immunities of plaintiff in error as a citizen of the United States, and deprives him of liberty and property without due process of law, and denies him the equal protection of the law as guaranteed by the first section of the Fourteenth Amendment of the Constitution of the United States, and under this assignment the following proposition is submitted:

"The State can not declare a trade, profession, occupation or business, to which none of the functions of government attach, to be an office, limit the number of citizens who may hold the same, and prohibit all others, whatever may be their qualifications and fitness, from pursuing such trade, profession, occupation or business. And the provisions of the Texas statute which declares a pilot to be an officer, and limits the number of citizens who can

serve as pilots to the defendants in error, and such deputies as they may choose to appoint, are void."

In disposing of this contention, the Court of Appeals of the Fourth District of Texas observes:

"Upon this subject much might be written. But in view of the universality of such laws and their long observance and enforcement in commercial countries, very little need be said. The object of such laws is to protect life and property from the perils incident to navigation.

"Steamship Co. vs. Joliffe, 2 Wall., 450.

"The subject comes fairly within the scope of governmental or police functions. We consider the case of Petterson vs. Board of Commissioners, 57 S. W., 1007, as deciding the questions raised by these assignments, against the contention of appellant."

The Petterson case referred to discusses the subject quite fully. We offer a few passages from the opinion:

"These laws were not passed for the furtherance or preservation of any individual right, but are necessarily a limitation on the rights of individuals. Their clear and manifest purpose is to secure a high order of service in a calling affecting interests of vast public and private concern. The securing of efficient pilots is not only needful in the interest of passengers and property which may be carried in ships, but the public is concerned in keeping its ports and navigable streams free from obstruction by wrecked or disabled vessels. Since the government has undertaken at public expense to maintain the depth of water in the more important ports and streams, and to keep them free from obstruction, the public concern is even greater, and the government clearly has the right and power to provide adequate means for the selection of suitable persons to perform the service. In 1789 Congress, finding that the various States whose territory touched navigable waters had enacted systems of pilotage laws, and perceiving that in the nature of things, and because of the

variant conditions existing in various ports and waters, a uniform system was unwise, if not impossible, expressly adopted such laws upon the subject as had already been enacted by the several States, and such as thereafter might be passed by them; thus relegating to the States a power which by an article of the Federal Constitution they had conferred upon Congress. For this reason the States are held in the enacting of laws upon this subject to be exercising an original power, and not one delegated by Congress. The Chase (D. C.), 14 Fed., 854. In the exercise of this power, they have been uniformly unmindful of the private right to exercise the calling of a pilot, and have unhesitatingly sacrificed such right where it appeared to stand in the way of the object to be accomplished. A like purpose runs through every article of the law in question."

A case in which public weighers acted jointly in enjoining one not holding such office from performing his duty, is that of Davidson vs. Sadler (C. C. A.), 57 S. W., 54. The court also there held that the law providing for public weighers is not unconstitutional because it deprives persons employed in public weighing before the enactment of the statute of their former means of livelihood.

Counsel for plaintiff in error contends that the position of branch pilot is not a public office, and that, therefore, the legislature can not prescribe the duties and limit the number of persons who shall enjoy the privileges attached to the position. If it be found that a branch pilot is a public officer, it would follow that the qualifications and number of persons so appointed could be constitutionally designated by the State legislature.

The statutes of Texas provide (Art. 3796) that the Governor shall appoint at each of the ports such number of branch pilots as may from time to time be necessary, each of whom *shall hold his office* for the term of two years. This is the period fixed by our constitution for terms of all offices, except where it expressly

provides otherwise. The statute further declares that in case of a vacancy *in such office*, the appointment shall be for the unexpired term only.

By Art. 3793, each pilot is required before entering into the duties of his *office*, to give bond with sureties in the sum of five thousand dollars, payable to the Governor and his successors, conditioned for the faithful performance of the duties of his *office*. The *oath of office* prescribed by the constitution must also be taken and subscribed by each pilot.

The Supreme Courts of California and Louisiana have decided that licensed state pilots are public officers as shown in Judge Gill's opinion.

Judge Gill further points out that "if the State, by imposing the duty of pilotage upon a select few, to the exclusion of the many, invades an inviolable right, does it not invade a like right when it requires the master of a vessel to pay pilotage, even if by his own skill he has brought his vessel safely into port? The public interest, as compared with the private right, is so vast, the private right must yield. A parallel in principle is found in the exercise by the State of the right to establish pest houses, and to place contagion patients in the charge of the government physicians, without reference to the wishes of the patient, thus denying to him the right to select his own medical attendant. In California the position of pilot is held to be an office, being so made by statute.

People vs. Woodbury, 14 Cal., 43.

Flynn vs. Abbott, 16 Cal., 359.

They seem to be treated as such in Massachusetts.

Doliver vs. Parks, 136 Mass., 499.

The Oregon law seems to authorize limitation as to number.

The California, 1 Sawy., 596, Fed. Cas. No. 2313.

The Indiana law seems to require bond and oath after appointment by the Governor.

Barnaby vs. State, 21 Ind., 450.

In New York the applicant is required to undergo a preliminary service for three years, during which time the board examines him three times. He then must serve as deputy for two years, after which he may be appointed by the Governor, by and with the consent of the Senate.

In Louisiana they are officers by force of the statute. See the Louisiana case supra. We have not these statutes before us, but the nature of their provisions are inferred from the cases cited."

* * *

"Courts should declare a law unconstitutional only when it is clearly so.

"Fletcher vs. Peck, 6 Cranch, 87, 3 L. E., 162.

"And a court should hesitate long to deny the power here undertaken to be exercised, in view of the practical similarity of the laws of all the States upon the subject, in view of their venerable age, during which they have either been free from a like attack or have else withstood its force, and in view of the forbearance of Congress, which at all times had the power to abrogate these laws or any objectionable feature therein."

The distinction between employments which are and which are not public offices is thus stated: "Where an employment or a duty is a continuing one, defined by rules prescribed by law and not by contract, such a charge or employment is an office." Measured by this rule the Galveston pilots are officers.

23 Am. & Eng. Encyc. of Law, 2d ed., 324, and cases cited in note 1.

The courts of last resort of Texas having held a pilot to be a public officer, this Court should adopt that construction of our statutes.

Plaintiff in error urges the novel view that the State can not declare so important an employment as that of pilot to be an office, in the constitutional and accepted sense of that term.

But the gist of the objection of the opponent, as we understand

it, is that the Texas law limits the class from whom pilots may be appointed to those who have served a probation under a pilot. (Texas R. S., Art. 3792.)

Our reply is that the legislature have the power and the right to declare what shall be necessary to qualify one for the appointment and subject to what conditions it shall be conferred. In other words, the law-making body has the right of classification.

Upon this subject our Court of Appeals in the Petterson case, with the approval of the Supreme Court, held that "it can not be urged that the requirement of service as a deputy is unwise or unreasonable, for it results in experience in the very waters in which they are afterwards to serve as pilots. The pilot is made responsible for the acts of his deputies, and he can not appoint one without examination and indorsement by the board. No better system could be devised for the securing of able and efficient men to perform the responsible and onerous service imposed;" that if this provision of the law should be abused by the pilots in recommending unsuitable persons as deputies, or in failing to recommend suitable persons in sufficient number, any person might be appointed a pilot by the Governor whom the board might find upon examination to be possessed of the other required qualifications, and that the power of the board to suspend and the Governor to remove at his will and pleasure would enable them to apply such discipline as to effectually control the appointment of deputies, if not, in fact, to name them.

And the right and duty of the pilots, subject to proper regulation by the board, to appoint their deputies who may thereafter be their successors or associates, is not an unlawful or unconstitutional delegation of authority by the legislature.

Some preliminary training for pilots is essential, and it is well nigh the universal practice in our maritime States to require a proper service as deputies or apprentices, as will appear from the statutes of those States to which we later make reference.

The case of Palmer vs. Woodbury, 14 Cal., 45, considered the validity of a provision in the pilot law of that State which required that "the candidate (for pilot) must be not only an American citizen, not under 21 years of age, but must have served two years on board a pilot boat, or have commanded a square rigged vessel in the coasting trade in and out of the harbor of San Francisco for three years," etc. Under this law a person was appointed pilot, and a *quo warranto* suit was instituted against the appointee upon the ground that he was ineligible to this place, because, first, he had not served two years aboard a pilot boat in the harbor of San Francisco, before the grant of license; and second, that he had never commanded a square rigged vessel in the coasting trade in and out of the harbor of San Francisco for three years before such grant. The Supreme Court held:

"Though by the acts of the legislature already cited, a power of appointment is given to the board of commissioners, the power is not unlimited. It does not authorize the board to appoint whomsoever it chooses to this office. A discretion is given as to the individuals to be appointed, and this discretion the courts can not control; but no discretion as to the classes from which these individuals shall be taken. The legislature has a right to declare these tests of eligibility, as well as to give the power to select.

They have declared them: 1. The appointee must be an American citizen. 2. Not under 21 years old. 3. He must have served two years on board a pilot boat or shall have commanded a square rigged vessel in the coasting trade in and out of the harbor of San Francisco.

The board, acting as a special commission, organized by act of the legislature, has just such powers as the act confers upon it. It can not transcend those powers. It must make its appointments from the classes of persons prescribed in the act. It could no more appoint a man as pilot who had not served two years or commanded a vessel than it could appoint a free negro or a woman."

This case was decided before the war and prior to the freedom of the negro.

The Fourteenth Amendment was not designed to interfere with the police power of the State, and the pilotage laws are police regulations of commerce. Congress possesses the right to establish these regulations, but as long as it does not assume this power, the States may exercise it.

In the language of Chief Justice Marshall, in Gibbons vs. Ogden, 9 Wheat, 207, "When the government of the Union was brought into existence, it found a system for the regulation of its pilots in full force in every State. The act which has been mentioned (the Act of 1789) adopts this system and gives it the same validity as if its provisions had been specially made by Congress." Will it be questioned that if Congress had taken charge of the entire subject its rights to prescribe an apprenticeship or a deputyship could be successfully challenged?

Tiedeman's Lim. of Police Power, 626.

Hughes on Admiralty, 28-38.

The China, 7 Wall., 53, 19 L. E., 67.

Wilson vs. McNamee, 102 U. S., 572; 26 L. E., 234, deciding that the pilot laws of New York, similar in principle to ours, are valid.

Legislation limited in its application, but operating alike on all persons similarly situated is not within the Fourteenth Amendment.

Barbier vs. Connolly, 113 U. S., 27; 28 L. E., 923.

The right to designate the class from which certain officers shall be selected carries with it the idea of inequality, but this fact alone does not determine the matter of constitutionality.

A. T. & S. F. Ry. vs. Matthews, 174 U. S., 106.

The Chase, 14 Fed., 854, decided by Judge Locke (S. D. Fla.), in 1882, was a case in which it was contended that the State, in framing pilot laws, acts by authority delegated or permitted by

Congress, and that the legislature, therefore, has no power to confer upon a local board or pilot commissioners the power to fix rates of pilotage. Judge Locke held that such delegation was not in conflict with Federal legislation. There was no appeal in that case.

The following cases are instances in which the State delegated to others the authority to recommend in one case, and to appoint in the other, the pilot commissioners of the ports of Boston and New York respectively:

Opinion of the Justices, 154 Mass., 603; 31 N. E., 634.

Sturges vs. Spofford, 45 N. Y., 446.

A leading case is Cooley vs. Board of Wardens, 12 How., 300; 13 L. E., 996. In considering the commerce clause of the Federal Constitution, the Court says:

"That the power to regulate commerce includes the regulation of navigation, we consider settled. And when we look to the nature of the service performed by pilots, to the relations which that service and its compensations bear to navigation between the several States, and between the ports of the United States and foreign countries, we are brought to the conclusion that the regulation of the qualifications of pilots, of the modes and times of offering and rendering their services, of the responsibilities which shall rest upon them, of the powers they shall possess, of the compensation they may demand, and of the penalties by which their rights may be enforced, do constitute regulations of navigation, and consequently of commerce, within the just meaning of this clause of the Constitution."

It will be noted that the court speaks of the regulation of the qualifications of pilots.

While it is conceded that Congress can, if it deems best, assume control of pilotage in every State, yet it is equally well settled that the mere grant to Congress of the power to regulate commerce did not deprive the States of the power to regulate pilots, unless and until Congress should determine otherwise. Thus far,

except as to coastwise steam vessels, the regulation of this subject has been left by Congress to the several States.

In *ex parte* McNiel, 13 Wall., 236; 20 L. E., 624, the holding was that pilot regulations are regulations of commerce, and that half pilotage is the necessary and usual part of every system; that State pilotage laws are constitutional and valid. We call particular attention to the terms of the New York law, thus referred to by the court:

"All appointments are required to be made upon the recommendation of the Board of Wardens of the Port of New York to the Governor, the nomination by him to the Senate of the State of the persons so recommended, and their confirmation by that body. Apprentices are required to serve three years, to be examined twice during the last year by the Board of Wardens, *and to serve two years afterwards as deputies before they can be appointed pilots.*" We italicize the last few words. The Texas law has a like provision. The court further observes:

"Pilots are a meritorious class and the service in which they are engaged is one of great importance to the public. It is frequently full of hardship, and sometimes of peril; night and day, in winter and in summer; in tempest and calm, they must be present at their proper places and ready to perform the duties of their vocation. They are thus shut out for the time being from more lucrative pursuits and confined to a single field of employment." This would seem to be a good reason for giving them the sole right to the recompense. Again, the court remarks:

"The Constitution took effect on the first Wednesday of March, 1789. Pilot laws existed in several of the States at that time, and were subsequently enacted in others. In all such States, it is believed, they have been changed from time to time, according to the will of the respective legislatures. Suits in the State courts have been founded upon them and recoveries had, and many such cases are reported. In none of them have we found

that the question was raised or a doubt expressed as to the validity of the laws or the authority of the States to enact them." A number of cases are cited by Judge Swayne. There was no dissent.

The Carrie L. Tyler, 106 Fed., 426.

The Creole, Fed. Cas. 13033.

Darden vs. Thompson, 101 Va., 635; 44 S. E., 755.

Counsel for Olsen argue that the duties of a pilot are those only of a trained seaman, familiar with the port, and not those pertaining to any governmental function.

It is not easy to define the nature of or extent of governmental control of public instrumentalities, especially those of commerce. We find that railroads, harbors and rivers are universally regarded as public highways and as subject to regulation by the State and by Congress, in certain cases.

As in the case of the locomotive engineer, Smith vs. Alabama, 128 U. S., 96; 32 L. E., 352, where a license was required, there is no doubt that the State could have prescribed further conditions than those which it did; such, for instance, as service as an apprentice.

Take the very case at bar. If the right to board a vessel and serve as a pilot in directing her safely through the intricacies of harbor navigation is a common right, can not the same thing be said of the right of any physician to board that vessel and assume to act as a quarantine officer? If he possesses knowledge and skill, he may be as well or better qualified than the officer appointed by the Governor for that purpose, but it is obvious, as the Court of Civil Appeals has so clearly demonstrated, that the public interests are involved and their representative, the State, must supervise and control, through its officers, these matters of general importance. So that it is not alone a question of skill and experience.

Again, the revenue department of the government sends men

upon board of the incoming steamer to perform certain duties of inspection. Other men may be as competent for this work as the customs officials, and, in fact, may be better able to appraise goods and make the necessary calculations and entries, and yet, on behalf of the orderly and responsible administration of government, they would not be permitted to do so, and the authority of the government to select those who should do the work has never been challenged.

Again, when the vessel reaches the wharf, an examination of hulls and boilers may be made. This is usually, if not invariably, done by officials, either of the government or of some insurance institution. The certificate of inspection of other men, well qualified though they might be, would be worthless.

Under our pilot law, defendant has the right to qualify himself and apply for appointment, but there is no obligation laid upon either the pilots to make him a deputy, or, if they should do so, upon the governor to appoint him a full pilot. A discretion is confided to these officers, and with respect to the pilots its abuse can be quickly redressed by the removal of the offender without a hearing.

The Court of Civil Appeals for the First District, in Petterson vs. Smith, 5 T. C. R., 547, which was a companion case to the present, but is not the Petterson case previously cited, the court said: "Except as to the party defendant the case is identical with the case of Olsen vs. Smith, 4 T. C. R., 982, decided by the Court of Civil Appeals at San Antonio, and every question save two presented in the briefs in this case were presented and passed on in the case cited. Since this cause was submitted our Supreme Court has refused a writ of error in Olsen's case, and we deem it unnecessary to seek to add anything to what was said in that case on the questions decided."

The two questions not included in the Olsen case were with respect to the joinder of all the pilots as plaintiffs in one suit, and

the further point that as the law gives the branch pilot offering his services the right to recover half pilotage from the vessels which refuse the services of a pilot, and $50 as a penalty from the person unlawfully piloting the vessel into the harbor, the branch pilot has no further recourse, and those choosing to violate his rights may do so, subject to the penalties prescribed and none other; and that for such reasons an injunction would not lie. The court negatived both of these contentions.

The averment that Olsen had offered his services and piloted vessels into port before any of plaintiffs had tendered their services shows, so Olsen alleges, that the pilots do not give to the public that quick and efficient service that commerce demands, and that competition might insure. The answer does not disclose under what circumstances defendant offered himself as a pilot. He could have intercepted a vessel by going far out to sea and meeting a single steamer coming from a given direction, while defendants in error, under the requirements of the law and the orders of the commissioners, were required to cruise in the proximity of the entrance to the harbor so as to be on hand and available to vessels approaching from any direction. It is not alleged that any British or other foreign ship was delayed while waiting for a pilot.

Again, defendant might have boarded a vessel at the wharf and, pretending to be a port pilot, have been employed to take her to sea. At any rate the modification of the decree of the District Court meets this complaint.

While the fact that the pilot laws of other sea-board States are similar to ours does not establish their validity, yet as it tends to show that such is almost the universal understanding we call attention to a number of them.

The laws of Alabama require a pilot to have served at least one year as an apprentice or boatkeeper of a pilot boat. Code of 1896, Secs. 2992, 2996, 2999.

In Florida, no one can be appointed a pilot unless he shall have served an apprenticeship of four years on a regular pilot boat. R. S. of 1892, Secs. 938 et seq.

In Delaware, an apprenticeship of six years on a pilot boat is required. Code of 1893, pp. 556, 558.

Georgia exacts a service of two years as apprentice on a pilot boat. Code of 1895, Secs. 1651, 1653, 1683, 1684.

In New York, apprentices must serve for three years as such, and for two years as deputy pilots. R. S. Vol. 3, pp. 2266, 2273.

No license will be granted in Virginia except after apprenticeship to a pilot of five years. Code of 1887, Secs. 1955, 1957, 1959.

The New Jersey statute prescribes that the applicant must have served as apprentice four years and three years as boatkeeper, before being licensed as a deputy. 2 Gen. Stats., Arts. 56, 59.

An apprenticeship is a condition precedent in Mississippi, but no particular time is fixed. Ann. Code, Secs. 2252, 2258, 2260, 2261.

In Maryland, at least five years' service as an apprentice in piloting is demanded. 2 Pub. Gen. Laws, Art. 74, Secs. 4, 6, 10.

An apprenticeship of three years is the law of South Carolina. R. S. of 1893, Secs. 1357-1365.

In North Carolina, the term of probation is three years. Battle's Rev., Chap. 87, Secs. 1, 7,

California has been already mentioned.

The other provisions with regard to pilot commissioners and other duties, the terms of office of pilots, and other details of the different State laws, resemble, in their general features, those of Texas.

An apprenticeship is substantially a deputyship, under our law.

It is a strong argument that these statutes have never been assailed upon any such grounds as are relied on by plaintiff in error.

The questions presented by plaintiff in error have thus far been

settled against him, if we read the law aright, and we trust this court will, after full consideration, adjudge the principles of the precedents to be with the lower court and the other courts that have determined analogous questions.

Respectfully submitted,

JAMES B. & CHARLES J. STUBBS.
Counsel for Defendants in Error, A. D. Smith et al.

APPENDIX.

The opinion of the Court of Civil Appeals of Texas in Petterson vs. Board of Commissioners of Pilots, May 24, 1900, in which case the Supreme Court denied a writ of error, is given in full:

GILL, J. This is an appeal from a judgment sustaining a general demurrer and special exceptions to a petition for mandamus. The purpose for which the mandamus was sought was to compel the board of commissioners of pilots for the port of Galveston to examine appellant as to his qualifications and fitness to act as a branch pilot, and to report their findings to the Governor of the State. Appellant's petition contained the following allegations, which he urges are sufficient, if true, to entitle him to the writ: He alleges that he is an American citizen, and has resided continuously for more than five years in the State of Texas; that he is a practical and skilled seaman, and holds license under the laws of the United States as pilot for coastwise steam vessels for the port of Galveston; that he is familiar with the harbor of Galveston, and the entrance thereto from the Gulf of Mexico, but has never been appointed a deputy pilot for the port, or served as such; that he has served for more than five years as a pilot on the United States revenue cutters on duty at said port, and is by education, training, and experience qualified in every way to act as a branch

pilot under the laws of the State of Texas; that he has repeatedly within the last two years requested appellees to examine him as to his qualifications to act as branch pilot at such port, to decide on same, and to report their findings to the Governor; that appellees refused to comply with his request, claiming that under the laws of the State of Texas they have no right or authority to examine any one for the position of branch pilot, unless the applicant has served as a deputy pilot under a branch pilot now commissioned for said port, and that no one can be examined or act as deputy pilot unless he has been appointed by one of the branch pilots, and has served as such one year. Then follows an allegation that there are only 11 branch pilots in service at the port; that they have unlawfully associated themselves together into a copartnership under the name of "Galveston Pilots' Association," for the purpose of monopolizing and controlling the pilotage of the port, and have so acted for several years; that they refuse to appoint any one as deputy who will not agree to act under and subordinate to the rules, orders, and regulations made by the association; that the refusal of appellees to examine any one except such as have been appointed by the present branch pilots as a deputy pilot, and the refusal of said pilots' association to deputize petitioner or any one else who desires to work in competition with said association, creates a monopoly in favor of the existing pilots, contrary to law, and against the rights of petitioner.

The articles of the Texas statutes (Rev. St.) bearing upon the subject provide as follows:

Art. 3790: "The Governor shall appoint with the consent of the Senate for each port whose population and circumstances shall warrant it, * * * a board of five persons of respectable standing under the denominations of 'commissioners of pilots.'" The remainder of the article prescribes their qualifications, etc., and empowers the Governor to suspend, fill vacancies, etc.

Article 3791 provides that "the board of commissioners shall be

authorized, if they deem it advisable, to examine and decide on the qualifications of any branch or deputy pilot whom they may find already appointed at the time of their organization; and it shall be their duty to examine each new applicant for the office of branch or deputy pilot, and to decide on his qualifications, recommending to the Governor, where new appointments are proper, such as are meritorious, and it shall also be their duty to examine into any case of alleged or supposed misconduct or inefficiency in branch or deputy pilots; and they shall be authorized after due hearing of accusation, testimony and defense, to suspend such pilot if sufficient cause appear, and during such suspension he shall not be allowed to exercise the functions of his office. The Governor, however, shall have power at his will and pleasure to remove any branch pilot or to reinstate any one who has been so suspended."

Article 3792 provides that the board of commissioners "shall require a certain term of residence in the State of Texas to authorize any person to exercise the functions of a branch pilot for their port or said bays; as also to establish a term of probation not exceeding one year as a deputy pilot before any person can exercise the functions of his office."

Article 3793 provides: "The board of commissioners of pilots shall have authority, within the limits provided in this title, to fix the rates of pilotage, and to establish regulations respecting the stations whereat and the times wherein pilots shall be on duty, with provisions for leave of absence; as also respecting the class, condition, number and use of pilot boats and such other minor regulations, compatible with the provisions of this title, as may be needed for the government of pilots and for the order and good effect of the proceedings of the board, of which proceedings a record shall be kept; provided, no regulation shall be adopted repugnant to the constitution."

Article 3794 provides: "The board shall be authorized and re-

quired to hear and determine all disputes that may arise respecting pilots and pilotage; to award to pilots extra compensation for extra services, * * * as also compensation for injurious loss of time incurred by pilots in waiting on vessels or by being carried off to sea on vessels by default of the master * * * when such pilot might have been landed." The remaining portions of this article fix the maximum of such compensation, and provides for appeals from the judgments of the board in such cases.

By article 3796 the Governor is authorized and required to appoint at each of the ports such number of branch pilots as may from time to time be necessary, each of whom shall hold his office for the term of two years. In case of a vacancy in said office, the appointment shall be for the unexpired term only.

By article 3797 branch pilots are required, before entering upon the duties of their office, to enter into bond with sureties in the sum of $5000, payable to the Governor and his successors in office, and conditions for the faithful performance of the duties of his office. Such bond is to be approved by the board of commissioners, and filed with the Secretary of State. The oath of office prescribed by the Constitution is also required to be taken and subscribed by each pilot, such oath to be indorsed on the back of the bond, and, together with the bond, is to be recorded in the county of the port before being forwarded to the Governor.

Under article 3798, each branch pilot may appoint two deputies, subject to examination and approval by the board, and a pilot appointing a deputy without such approval forfeits his own appointment. The board is also clothed with authority to restrict all deputy pilots from piloting vessels over a certain draught.

Article 3799 provides the penalties of suspension and dismissal for certain named acts of malfeasance.

Article 3800 fixes the rate of pilotage upon classes of vessels subject thereto, and provides that the master of a vessel refusing

the services of a pilot shall be liable to such pilot for half the rate of pilotage which he would have earned if accepted.

Article 3803 prescribes a penalty of $50 against any unauthorized person acting as branch pilot, such penalty to be recovered at the suit of any duly authorized branch pilot, brought in any court of competent jurisdiction.

The above articles are believed to be all of the Texas pilotage laws which have any bearing on the questions raised on this appeal, or which are necessary to be discussed in this opinion.

The trial court seems to have held the petition insufficient to show the plaintiff entitled to the writ (1) because under the law the position of branch pilot is an office to which the Governor has the power, in his absolute discretion, to appoint such persons, and such a number of persons, as he may consider necessary for the needs of the port, and the petition does not show that the Governor has thought it necessary to appoint a greater number than are now in service; (2) these appointments are required under the law to be made from the class of persons who have complied with the requirements as to residence in the State for the time fixed by the commissioners, and as to service as deputy pilot for the time fixed by them, and the petition does not allege the plaintiff to be one of that class.

Appellant's first, second, fourth, fifth and sixth assignments of error are thus interpreted by his proposition thereunder: "When a skilled seaman, who is by education, training, and experience mentally, morally, and physically qualified to act as pilot for the port of Galveston, applies to the commissioners to be examined as to his qualifications to act as branch pilot, the board should examine the applicant, notwithstanding the fact that he has never been appointed or served as deputy pilot for the port." Under this appellant contends that the provision empowering branch pilots to select two deputies, and providing that no person who has not served the requisite term as deputy can become a branch

pilot, is inoperative—First, because the article undertaking to empower the board to fix a term of probation for deputy pilots is void for uncertainty, and if not void for uncertainty is merely directory is unconstitutional, because it places it in the power of the pilots already serving to continue themselves in office or become their own successors by refusing to appoint deputies, or by discharging those appointed before the time of probation expires; second, the law, construed as a whole, clearly requires the board to examine and report upon every applicant, in order that the Governor, in his discretion, may appoint such persons, and such number, as the needs of the port may require, and thus accomplish the objects contemplated by the law.

While the latter clause of article 3792 is of faulty construction, we do not believe it can be held to be void for uncertainty. The sense of it seems to us very plain, and the defect complained of is so insignificant and obscure that a casual reading of the article does not disclose it. We do not deem it necessary to follow counsel for appellant in his discussion of the rules of construction. The article has stood unchanged since 1846, the date of its passage. So far as we are able to ascertain, the construction placed upon it has been uniform. No one has been misled by the defective phrase, "as also to," etc. It is not a statute which has only occasionally been called into force, but has been an active, operative statute by which the boards of pilot commissioners have been controlled, and under which the important service of pilotage has been conducted. If a graver reason were urged, the court might well hesitate to hold a statute void for uncertainty which has for so many years received a common and uniform construction, and has answered the purposes for which it was passed. If, as contended by appellant, the provision is merely directory, we fail to perceive in what respect appellant could be benefited by such a holding. Directory statutes are not void, nor may they be suspended for that reason at the suit of an individual. The question

usually arises when the validity of some official act is called in question on the ground that the statutory prerequisites have not been performed. If the statute is mandatory, the official act is invalid; if directory merely, the act may nevertheless stand. In the case at bar there are strong reasons for holding the provision directory, and this aspect of the clause will be referred to further on in this opinion.

The further contention of appellant in this connection, to the effect that the provision is directory, and therefore can not limit a prior mandatory provision which requires the board to examine all applicants, is, we think, unsound. These laws were not passed for the furtherance or preservation of any individual right, but are necessarily a limitation on the rights of individuals. Their clear and manifest purpose is to secure a high order of service in a calling affecting interests of vast public and private concern. The securing of efficient pilots is not only needful in the interest of passengers and property which may be carried in ships, but the public is concerned in keeping its ports and navigable streams free from obstruction by wrecked or disabled vessels. Since the government has undertaken at public expense to maintain the depth of water in the more important ports and streams, and to keep them free from obstruction, the public concern is ever greater, and the government clearly has the right and power to provide adequate means for the selection of suitable persons to perform the service. In 1789, Congress, finding that the various States whose territory touched navigable waters had enacted systems of pilotage laws, and perceiving that in the nature of things, and because of the variant conditions existing in various ports and waters, a uniform system was unwise, if not impossible, expressly adopted such laws upon the subject as had already been enacted by the several States, and such as thereafter might be passed by them; thus relegating to the States a power which by an article of the Federal Constitution they had conferred upon Congress. For

this reason the States are held in the enacting of laws upon this subject to be exercising an original power, and not one delegated by Congress. The Chase (D. C.), 14 Fed., 854. In the exercise of this power, they have been uniformly unmindful of the private right to exercise the calling of a pilot, and have unhesitatingly sacrificed such right where it appeared to stand in the way of the object to be accomplished. A like purpose runs through every article of the law in question, and it seems clear that when the duty was imposed to "examine each new applicant, * * * recommending to the Governor, where new appointments are proper, such as are meritorious," it was meant to provide against the recommendation of any person without the careful examination required. Of course, there is a point beyond which the lawmakers can not go in subordinating the interest of the individual to the welfare of the public, and if the petition had alleged a compliance on the part of plaintiff with the provisions as to residence and service, and had further alleged that the Governor had declared that new appointments were proper, the court would doubtless have allowed the writ to prevent the discrimination against him which would have been apparent from the allegation. He would have had the same right as another to have his name considered by the Governor, if he was found to possess the requisite qualifications. That the right of an individual to examination and appointment is not absolute is evidenced by parts of this very law which are not assailed, notably the power conferred on the Governor to limit the number of pilots in any port, being controlled in his discretion by the needs of the port; also the power of the Governor to remove any pilot for any reason, or for no reason, the language of the act being, "at his will and pleasure."

Recurring to article 3791 it seems to us to have been intended that the Governor should have both the appointing power and the discretion as to the needs of the port, the board in this latter respect being advisory. This conclusion is authorized both by

the language of the act and the object sought to be accomplished. The board resides at the port, and, being charged with the duty of appointing stations and hours for the pilots, must, in the exercise of that duty, learn the necessities of the port, and it would be their plain duty, if new or other pilots were necessary, to call the Governor's attention to the situation, and recommend suitable persons from whom he might select. The Governor might ignore their suggestions, or conclude, in the absence of suggestions, that more were necessary, in which event he could require them to furnish him with names as provided by law. To hold that the board should examine all who apply would be to compel them to do in many cases an idle and futile thing; for if no vacancy existed, and no new appointments were necessary, there could be no purpose to be accomplished by the examination. If any considerable time elapsed from the date of the examination until the appointment was necessary, the applicant might in many ways become unsuitable,—might cease to be "meritorious." The clause, "where new appointments are proper," can not be held to be meaningless. If the State had the power to limit the number of pilots at this port, the whole can stand.

Whether or not the provision, construed in connection with other parts of the law, and which together apparently make the Governor's power to appoint dependent on the appointment of deputies by pilots already in service, is constitutional, may be a graver question. The contention that it enables the pilot to perpetuate himself in office or to select his successor, thus depriving the Governor of that discretion with which the law clearly clothes him, is not without force. The mere fact, however, that a law is susceptible of perversion or abuse, can not render it invalid. Nevertheless, if the evil complained of was the inevitable effect of the law, the courts could decline to enforce it. The reasons are apparent. We think the law in its other provisions furnishes an efficient remedy for the threatened or possible wrong. In the first

place, if the clause requiring a term of service as deputy pilot be directory (and it seems to be so), the Governor or board could ignore it in case of abuse, and any person might be appointed whom the board might find upon examination to be possessed of the other required qualifications. Again, the board has power to suspend, and the Governor to remove, in such a case, and the pilots in office could be so disciplined as to compel a cessation of the abuse complained of. If the pilots in office, for the purpose of maintaining themselves in office, should adopt a system of discharging their deputies just before the expiration of the probationary period, their purpose could be easily thwarted under the power possessed by the board to fix or change the probationary period at will, and this could be done without notice, and the deputies in service thus placed in a position to be examined for appointment.

It can not be urged that the requirement of service as a deputy is unwise or unreasonable, for it results in experience in the very waters in which they are afterwards to serve as pilots. The pilot is made responsible for the acts of his deputies, and he can not appoint one without examination and indorsement by the board. No better system could be devised for the securing of able and efficient men to perform the responsible and onerous service imposed.

As to the supposed case of the simultaneous loss or destruction of all appointed pilots and deputies in one catastrophe (suggested by counsel), the law does not leave commerce helpless even in that case; for in such event his client, or any other fit person, could perform the service without fear of punishment. The penalty is only enforceable at the suit of a pilot in office. We think the law itself meets the point presented, and appellant's contention can not be allowed.

Under the eighth, ninth and tenth assignments, it is urged that the court erred in holding that the 11 branch pilots for the port of

Galveston have the right to associate themselves together for the purpose of monopolizing and controlling the pilotage of said port. In Jones vs. Clifford's Ex'r, 5 Fla., 510, it was held that the formation of a partnership among all the pilots of a port was not unlawful, but commendable, for the reason that by so doing they could relieve each other at stated hours, purchase better boats with their joint funds, and otherwise conduce to better service. Of course, the question of monopoly was not present in that case. In Louisiana pilots are distinctly held to be public officers, yet the formation among them of a partnership is permitted by statute. Levine vs. Michel, 35 La. Ann., 1121. An office is necessarily a monopoly, in a certain sense. But it is unnecessary to pass on the question here, for neither the pilots' association as alleged, nor the individual pilots, are parties to this suit, and we presume the fact was alleged to show an excuse for the failure of plaintiff to serve his probation as deputy pilot; perhaps, also, to emphasize the contention that the law was open to this abuse, and was in fact being perverted.

It is not complained that they have not appointed sufficient number of competent deputies according to the strict requirements of the law, but that for a wrong motive, and a wrong reason, they have not appointed plaintiff. The pilots in office necessarily have a monopoly. Should the Governor double the number, the fact would remain. The compensation for their services is absolutely fixed by the authorities under the law. Of course, this court can not commend the motive alleged, but the allegation can not affect the result in this case. It is not averred that the board or the Governor is concerned in this wrong purpose, or have connived at it, or have failed to remedy the evil after it was called to their attention. They have an efficient and summary remedy.

Under the eleventh assignment of error, the action of the trial court is assailed on the ground that a branch pilot is not an officer of the State of Texas—First because he exercises no function of

government, and is a part neither of the legislative, executive, nor judicial departments; second, because to every citizen is guaranteed the right to follow any lawful profession, trade, or calling, limited only by such regulations as the interest of the public may require, and the legislature cannot, under the guise of regulation, permit a few to engage in such calling to the exclusion of others; third, because by the provisions of an act of congress no person may act as pilot on coastwise steam vessels unless he have a license issued under the provisions of the federal law, and therefore, if he be a State officer, he is also a federal officer, which contravenes the provision that no person shall at the same time hold a State and Federal office.

Whether a pilot exercises any of the functions of government, and to what department he is properly assignable, are questions which we will not stop to determine. That the legislature intended to make them officers is manifest from the terms of the law. This does not seem to be controverted.

We do not think the fact that he performs a part of what were his original duties under the State law, by authority of a license issued under the federal act, militates against this holding. The Federal act does not undertake to make him a Federal officer, but merely licenses him. The act last mentioned expressly leaves undisturbed the provisions of the State law, except as to the class of vessels to which the Federal act applies.

Whether the duties of a pilot are such as the State may rightfully confide alone to a limited number of men of its own selection, to the exclusion of all others, however well qualified, seems at first glance to be very questionable, and is a point upon which we have been able to find no authority, nor are we cited to any. The vast majority of pilotage cases have arisen in the enforcement by pilots of their rights to pilotage fees, where the service was tendered and refused. These cases bear upon the present question only by analogy. The right to enforce the collection of

fees in such case has been upheld without a single exception, so far as we have been able to ascertain. In ex parte McNeil, 13 Wall, 236, 20 L. Ed., 624, the right is upheld, it being declared a necessary and usual part of every system of such provisions. The fact is noted that like provisions have obtained from an early day, and are to be found in the laws of most commercial States. The Roman law obliged the captain to take a pilot or be responsible for the damages that might ensue. The Hanseatic ordinances, the maritime laws of Sweden, the Netherlands, France, England, and ten of the States of the Union contained provisions under which a penalty was incurred if the services of a pilot were refused. The law in question is as old as the State, and contains a similar provision. Now, if the State, by imposing the duty of pilotage upon a select few, to the exclusion of many, invades an inviolable right, does it not invade a like right when it requires the master of a vessel to pay pilotage, even if by his own skill he has brought his vessel safely into port? The public interest, as compared with the private right, is so vast, the private right must yield. A parallel in principle is found in the exercise by the State of the right to establish pest houses, and to place contagion patients in the charge of the government physicians, without reference to the wishes of the patient, thus denying to him the right to select his own medical attendant. In California the position of pilot is held to be an office, being so made by statute. People vs. Woodbury, 14 Cal., 43; Flynn vs. Abbott, 16 Cal., 359. They seem to be treated as such in Massachusetts. Dolliver vs. Parks, 136 Mass., 499. The Oregon law seems to authorize limitation as to number. The California, 1 Sawy., 596, Fed. Cas. No. 2313. The Indiana law seems to require bond and oath after appointment by the Governor. Barnaby vs. State, 21 Ind., 450. In New York the applicant is required to undergo a preliminary service for three years, during which time the board examines him three times. He then must serve as deputy for two years, after which

he may be appointed by the Governor, by and with the consent of the Senate. In Louisiana they are officers by force of the statute. See the Louisiana case, supra. We have not these statutes before us, but the nature of their provisions are inferred from the cases cited. In Georgia the statute does not make them such, and, of course, they are held not so to be. Dean vs. Healy, 66 Ga., 503; Wright vs. Commissioners, 69 Ga., 350. These cases, however, were decided upon the statute, and not upon principle.

Courts should declare a law unconstitutional only when it is clearly so. Fletcher vs. Peck, 6 Cranch, 87, 3 L. Ed., 162. And a court should hesitate long to deny the power here undertaken to be exercised, in view of the practical similarity of the laws of all the States upon the subject, in view of their venerable age, during which they have either been free from a like attack or have else withstood its force, and in view of the forbearance of Congress, which at all times had the power to abrogate these laws or any objectionable feature therein. We might also refuse to disturb the law for the reason that it is conceded, for the purposes of this case, that the State has the right to limit the number who may engage as pilots at this port, the law having conferred that power on the Governor. The appellant is in this position: If the features of the law which he attacks are stricken out, the law is so crippled as to be unenforceable, or if enough remains it can not be said that the legislature would have passed it in the absence of those provisions; in which event the appellant has no standing in court, for the right he seeks to enforce is asserted under the law in question. If the law stands, he has not complied with its provisions, and a demurrer was properly sustained. The judgment of the trial court is affirmed.

We also submit the opinion of Hon. David E. Bryant, Judge of the United States Court for the Eastern District of Texas, rendered Nov. 8, 1901, in the cases of McDonald et al. vs. Steamships Eric, Lingfield and Ashmore, involving some of the ques-

tions here raised. There was no appeal taken from these judgments:

"I have no doubt as to the right of libellants to recover half pilotage. They are commissioned by the Governor of Texas as pilots of the port of Galveston, and also hold licenses as United States pilots, and certain of their number tendered their services as alleged.

"While it is clear that article 3801 of the Texas Revised Statutes, exempting certain vessels from pilotage, unless for actual services, is void because of the attempted discrimination in favor of vessels engaged in the coasting trade between Texas ports, being in conflict with section 4237 of the Revised Statutes of the United States, yet as this relates to coasters only, the rest of the act is valid in respect to vessels engaged in the foreign trade, as were those described in the present libels.

"The rule applies here, as it did in the case of Reagan vs. Farmers' Loan & Trust Co., 154 U. S., 362, that where the prime object of a statute can be fully accomplished, irrespective of an invalid section or provision, it will be upheld, and here the part of the Texas statute that applies to foreign vessels is separable from and not dependent in any manner upon that section which seeks to discriminate between coasting vessels of different States.

"The libellants as an association have a right to bring suit, although only one of them may have tendered his service as a pilot to the steamers in question to pilot them in and out of this port.

"The service is one of responsibility, requiring much skill and experience, and the pilots holding their appointments both under the general and State governments, are enabled to perform the service required of them more effectively by uniting their earnings and efforts, so as to obtain the necessary pilot boats and appliances and to be always ready for duty. I see nothing objectionable or unlawful in this, but much that is commendable.

"As to the claim that the organization is violative of the anti-

trust or anti-monopoly acts of Congress and of the legislature I can discover no foundation for it. Every one who holds an office necessarily holds it to the exclusion of some one else who may desire it and in that remote sense it may be termed a monopoly, but there is nothing in the State pilot law which is in restraint of trade. The maximum rates of pilotage are prescribed by statute, and the pilots have no control over them; their reduction rests with the pilot commissioners. Nor does it appear to me that there is any conflict between this law and the treaty of 1815, between the United States and Great Britain. That treaty stipulates that British vessels shall not be subject to any duties or charges that American vessels would not be subject to if similarly engaged, and as under our law coastwise steam vessels are exempt from compulsory pilotage, so a British vessel, if engaged in the coastwise trade, would also be exempt. That treaty provides for reciprocity in this respect. As the steamers in question, however, were not coasters, the treaty is not applicable.

"The questions have been ably presented, but none of the objections raised are such as to deny libellants the right to half pilotage, and the decree will be in their favor."

Supreme Court of the United States.

No. 42.—October Term, 1904.

Otto Olsen, Plaintiff in Error, vs. A. D. Smith, L. Huth, L. Best, et al. } In error to the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas.

[November 28, 1904.]

Mr. Justice White delivered the opinion of the Court.

The defendants in error, who were plaintiffs in the court of original jurisdiction, as the duly licensed State pilots of the port of Galveston, Texas, sued in a Texas District Court to recover the damages averred to have been caused them by the alleged illegal action of the defendant in offering, when he was not authorized by law to do so, his services "to pilot sail vessels or registered steamers, bound to or from foreign ports, in or out of the port of Galveston." An injunction was prayed restraining the defendant from acting "in any manner as branch or deputy pilot, or pilot under the laws of the State of Texas, and of said port, or under the laws of the United States, with respect to the kind of vessels specified." The defendant filed a general demurrer, and, reserving the demurrer, answered, raising special defenses based on averments that the pilotage laws of Texas were in conflict with the Constitution and laws of the United States. The court overruled the demurrer of the defendant, and, on the ground that no defense was stated, sustained a demurrer to the answer. A judgment was entered in favor of the plaintiffs, awarding an injunction as prayed. (68 S. W. Rep. 320.) The case was taken to the Court of Civil Appeals for the First Supreme Judicial District, was thence transferred to the Court of Civil Appeals for the Fourth Supreme Judicial District, where the decree below was affirmed, with a slight modification not necessary to be stated. The Supreme Court of the State having declined to review the action of the Court of Civil Appeals, this writ of error was prosecuted to the latter court.

The defenses raised by the answer, which the court below held to be no defense to the action, and which are in effect reiterated in the assignments of error, require us to determine, first, whether the State of Texas had power to enact laws regulating pilotage in the ports of that State; and, second, if such power existed, whether the provisions of the State statutes on that subject are void because they conflict with acts of Congress on the subject of pilotage, and because the statutes of Texas as to pilotage contain pro-

visions of such a character as to cause them to be repugnant to the Fourteenth Amendment or to the laws of Congress forbidding combinations in restraint of trade or commerce. Briefly, the pilotage laws of the State of Texas provide as follows: The governor is authorized to appoint for each port, whose population and circumstances shall warrant it, "a board of five persons of respectable standing, to be known as commissioners of pilotage." Upon this board power is conferred to fix, within the maximum limits provided by law, the charges to be made by branch and deputy pilots for their services, to regulate the manner in which such pilots shall perform their duty, to examine them as to their qualifications, to hear complaints made against them, and, if occasion requires, to suspend them until the governor shall act in the matter. Upon the governor is conferred the authority to appoint such number of branch pilots as may from time to time be necessary, each of whom shall hold office for two years, subject to removal by the governor at pleasure, and any one who is not a duly commissioned branch pilot or deputy thereof is prohibited from engaging in the business of pilotage so far as the statutes provide for pilotage services by the duly appointed pilots. (Revised Statutes of the State of Texas for 1895, articles 3790, 3791, 3792, 3793, 3794, 3796 and 3803.) The maximum rates of pilotage are provided for as follows:

"The rate of pilotage on any class of vessels shall not, in any port of this State, exceed four dollars for each foot of water which the vessel at the time of piloting draws, and whenever a vessel, except of the classes below excepted, shall decline the services of a pilot, offered outside of the bar, and shall enter the port without the aid of one, she shall be liable to the first pilot whose services she so declined, for the payment of half pilotage; and any vessel which, after being brought in by a pilot, shall go out without employing one, shall be liable to the payment of half pilotage to the pilot who brought her in, or, if she has come in without the aid of a pilot, though offered outside, she shall, on so going out, be liable for the payment of half pilotage to the pilot who had first offered his services before she came in, but if she has come in without the aid of a pilot, or the offer of one outside, she shall not, in case of going out without a pilot, be liable to half pilotage. . . ." (Article 3800.)

The vessels excepted from the operation of the foregoing provisions are thus stated in article 3801:

"The following classes of vessels shall be free from any charge for pilotage, unless for actual service, to wit: All vessels of twenty tons and under, all vessels of whatsoever burden owned in the State of Texas and registered and licensed in the district of Texas, when arriving from or departing to any port of the State of Texas; all vessels of seventy-five tons and under, owned and licensed for the coasting trade in any part of the United States, when arriving from or departing to any port in the State of Texas; all vessels of seventy-five tons or under owned in the State of Texas and licensed for the coasting trade in the district of Texas when arriving from or departing to any port in the United States."

The first contention in effect is that the State was without power to legislate concerning pilotage, because any enactment on that subject is necessarily a regulation of commerce within the provision of the Constitution of the United States. The unsoundness of this contention is demonstrated by the previous decisions of this court, since it has long since been settled that even although State laws concerning pilotage are regulations of commerce, "they fall within that class of powers which may be exercised by the States until Congress has seen fit to act upon the subject." (*Cooley* v. *The Board of Wardens*, 12 How. 299; *Ex parte McNiel*, 13 Wall. 237; *Wilson* v. *McNamee*, 102 U. S. 572.)

The second proposition relied on is that, albeit the State had power to legislate concerning pilotage until Congress acted, the State laws are void because in conflict with the laws enacted by Congress. This is based upon two provisions of the Revised Statutes of the United States, the one providing "that no regulations or provisions shall be adopted by any State which shall make any discrimination in the rate of pilotage or half pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States, and all existing regulations or provisions making any such discrimination are annulled and abrogated," (Rev. Stat. 437;) the other being the provision of the statutes, (Rev. Stat. 1444,) exempting coastwise steam vessels from the operation of State pilotage laws. Undoubtedly the exempting clause of the Texas statute is discriminatory, and is therefore void, because in conflict with the law of the United States. The court below so decided. It held, however, that the provisions discriminating in favor of Texas ships and ports were separable from the remainder of the statutes, and therefore the general regulations concerning pilotage were valid, although the discriminating provisions were eliminated. Whether the illegal clauses granting discriminatory exemptions could be eliminated without destroying the other provisions of the State laws regulating pilotage, is a State and not a Federal question. For the purpose of determining the validity of the statutes in their Federal aspect this court accepts the interpretation given to the statutes by the State court and tests their validity accordingly. (*W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452, 466, and authorities there cited.) True it is in *Spraigue* v. *Thompson*, (118 U. S. 90,) a case involving the pilotage laws of Georgia, in the course of the opinion it was remarked (p. 94) that the ruling of the Supreme Court of the State of Georgia, that the illegal provision of the statute in question was separable, caused the statute "to enact what confessedly the legislature never meant." But this remark was not made the basis of the conclusion, since it was decided in that case that the pilotage charge in question was invalid, even under the

construction given by the Supreme Court of the State of Georgia to the State statute, because the exaction which was in controversy was in conflict with the provisions of the Revised Statute of the United States, exempting coastwise steam vessels from pilotage charges. In any event, it is apparent that the observation referred to, made in the case of *Spraigue* v. *Thompson*, has been qualified by the later decisions of this court to which we have previously referred.

Of course, whilst accepting the construction of the State court as to the divisibility of the statute, the duty yet remains, for the purpose of the Federal question, to determine whether the statute as construed is valid. As the effect of the construction below was to eliminate the discrimination from the statute, it is clear, in view of the power of the State to legislate concerning pilotage until Congress acts upon the subject, that the statutes, as interpreted below, were within the power of the State and not in conflict with any act of Congress. Indeed, it is obvious from the provisions of the Revised Statutes, (sec. 4237,) forbidding discrimination in State legislation concerning pilotage, that Congress did not intend by that section to revoke the power of the States on the subject or to abrogate existing pilotage laws of the several States containing discriminatory provisions, but only to abrogate the provisions making the discrimination. This results since the statute, after first generally prohibiting regulations by any State discriminating "in the rate of pilotage or half pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States," in careful language annuls and abrogates only "all existing regulations or provisions making any such discrimination." And this construction of the section in question disposes also of the argument that if the statute be accepted as interpreted by the State court, it is nevertheless repugnant to the law of the United States, since, if the exceptions found in the State statute are eliminated, then those statutes impose pilotage charges upon all vessels, and hence subject coastwise steam vessels of the United States to such charges, although they are expressly exempted therefrom. (Revised Statutes, 4444.) But the provisions of that section clearly contemplated that by the existing State laws, coastwise steam vessels of the United States were subject to pilotage charges, and proposed, whilst withdrawing such vessels from pilotage charges, not in other respects to interfere with the State laws on the subject of pilotage. This is plainly the result of the following provision contained in the section in question:

"Nothing in this title shall be considered to annul or affect any regulation established by the laws of any State, requiring vessels entering or leaving a port in any such State other than coastwise steam vessels, to take a pilot duly licensed or authorized by the laws of such State."

Nor is there merit in the contention that, as the vessel in question was a British vessel coming from a foreign port, the State laws concerning pilotage are in conflict with a treaty between Great Britain and the United States, providing that "No higher or other duties or charges shall be imposed in any ports of the United States on British vessels than those payable in the same ports by vessels of the United States." Neither the exemption of coastwise steam vessels from pilotage, resulting from the law of the United States, nor any lawful exemption of coastwise vessels created by the State law, concerns vessels in the foreign trade, and, therefore, any such exemptions do not operate to produce a discrimination against British vessels engaged in foreign trade and in favor of vessels of the United States in such trade. In substance the proposition but asserts that because by the law of the United States steam vessels in the coastwise trade have been exempt from pilotage regulations, therefore there is no power to subject vessels in foreign trade to pilotage regulations, even although such regulations apply, without discrimination, to all vessels engaged in such foreign trade, whether domestic or foreign.

It remains only to consider the contentions based upon the Fourteenth Amendment and the anti-trust laws of Congress. The argument is, that the right of a person who is competent to perform pilotage services to render them is an inherent right guaranteed by the Fourteenth Amendment, and that therefore all State regulations providing for the appointment of pilots and restricting the right to pilot to those duly appointed, are repugnant to the Fourteenth Amendment. But this proposition in its essence simply denies that pilotage is subject to governmental control, and therefore is foreclosed by the adjudications to which we have previously referred. The contention that because the commissioned pilots have a monopoly of the business, and by combination among themselves exclude all others from rendering pilotage services, is also but a denial of the authority of the State to regulate, since if the State has the power to regulate, and in so doing to appoint and commission those who are to perform pilotage services, it must follow that no monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the State are alone allowed to perform the duties devolving upon them by law. When the propositions just referred to are considered in their ultimate aspect they amount simply to the contention, not that the Texas laws are void for want of power, but that they are unwise. If an analysis of those laws justified such conclusion—which we do not at all imply is the case—the remedy is in Congress, in whom the ultimate authority on the subject is vested, and cannot be judicially afforded by denying the power of the State to exercise its authority over a subject concerning which it has plenary power until Congress has seen fit to act in the premises.

Affirmed.